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1958
BROWNING

No. 806

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

TOMMY AND PRESTON BELLEW ..... Appellants

versus

STATE OF MISSISSIPPI ..... Appellee

(APPEAL FROM THE SUPREME COURT OF MISSISSIPPI)

STATEMENT AS TO JURISDICTION.

MRS. CLARE SEKUL HORNSBY,
JOHN M. SEKUL,
ALBERT SIDNEY JOHNSTON, JR.,
Counsel for Appellants.

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(APPEAL FROM THE SUPREME COURT OF MISSISSIPPI)

JURISDICTIONAL STATEMENT

In compliance with Rule 15 of the Supreme Court of the United States, effective July 1, 1954, appellants Tommy and Preston Bellew, adult resident citizens of the State of Mississippi, submit herewith their statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment of the Supreme Court of Mississippi in Cause No. 40,863, affirming a judgment of the circuit court of Harrison County, in said state. This appeal involves identical questions as to both appellants decided in one opinion by the State court upon a common record and a single jurisdictional statement is filed. Appellants will also file and docket a petition for certiorari in their appeal-cause, under 28 U. S. C. § 1257 (3), because important questions affecting law enforcement and the rights of accused under the Fourteenth Amendment are involved. The doctrine of the Lanzetta, Winters and Chaplinsky

Cases need(s) amplification in their application to the expansion of the state criminal statutes to include what is not plainly embraced within their language and context.

THE OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported in ..... Miss. ..... , 106 So. 2d 146. Copy of the opinion is attached hereto as Appendix A.

JURISDICTION

1. These are appeals from a final decision of the Supreme Court of Mississippi affirming a judgment of the circuit court of Harrison County, convicting appellants, Tommy Bellew and Preston Bellew, of the crime of harboring and concealing one Dale Morris, an escaped prisoner who was held to await trial on a charge of murder of one Charles Flink, and imposing a sentence on appellants of three years each in the State penitentiary, under the purported authority of Sec. 2142.5, Mississippi Code of 1942, Recompiled.

2. The Supreme Court of Mississippi handed down its opinion on November 3, 1958. Appellants' suggestion of error and amended suggestion of error were overruled on December 15, 1958. Notice of Appeal to the Supreme Court of the United States was filed by appellants with the Clerk of the Supreme Court of Mississippi on December 16, 1958, because appellants were then at large on bail and the sheriff of their county had been requested to take them into custody and transport appellants to the state penitentiary, to begin serving their sentences. Copies of the opinion and judgments of the state court are attached hereto, as required by Rule 15.

3. The jurisdiction of this Court upon appeal is conferred by 28 U. S. C. A. § 1257 (2). Appellants challenge

the validity of Sections 2142.5 of the Mississippi Code of 1942, Recompiled, and 677 of the Mississippi Code of 1942, Recompiled, on the ground that, as construed and applied against them, said state statutes are repugnant to the Constitution of the United States, and the decision of the highest court of the state of Mississippi was in favor of their validity.

4. Cases believed to sustain the jurisdiction of this Court on appeal include Winters v. New York, 333 U. S. 507; United States v. Spector, 343 U. S. 169 and United States v. Resnick, 299 U. S. 207.

5. Copies of Sections 2142.5 and 677 of the Mississippi Code of 1942, the statutes involved within the meaning of 28 U. S. C. A. § 1257 (2), are attached hereto as Appendices B and C. Said statutes in issue here are as follows: (quote)

"Every person who shall knowingly conceal or harbor any prisoner or convict who has escaped from the lawful custody of any officer, jail, prison, or the penitentiary, within this state shall be guilty of a felony and upon conviction shall be fined not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00) or by imprisonment in the penitentiary not to exceed five (5) years." (Code 1942, § 2142.5)

"The term 'felony,' when used in any statute, shall mean any violation of law punished with death or confinement in the penitentiary." (Code 1942, § 677)

These state statutes were construed and applied to the undisputed facts showing that the appellants were not guilty of harboring and concealing one Dale Morris, then a prisoner in jail in the City of Gulfport, Mississippi, awaiting trial on a charge of murder, as the words

"harbor" and "conceal" are defined by all the lexicographers and the decided cases, both state and Federal; appellants did no more than to furnish food and bedding to the said Morris, and one of the appellants, viz: Preston Bellew, showed Morris where he might remain in the woods some three-quarters of a mile, or so, from the home of Preston Bellew. In extending the state statute by construction and intendment, the state court denied appellants due process of law and the equal protection of the law, guaranteed against abridgment by the Fourteenth Amendment of the United States Constitution. By construing and applying Code 1942, Section 677, to the facts of this case against appellants, the state court literally wrote into Section 2142.5, of the Mississippi Code of 1942, what the legislature of the state omitted, and held the trial court or the jury was given the discretion to fix the punishment for the offenses intended to be covered by said Section 2142.5, Code of 1942, by imprisonment in the penitentiary, or by fine or confinement in the county jail, notwithstanding the said statute gives no discretion whatever to the court or jury. Such construction and application of the statute denied appellants due process of law and the equal protection of the law, guaranteed against abridgment by the Fourteenth Amendment of the United States Constitution.

QUESTIONS PRESENTED

1. Whether the proceedings against appellants in the trial court of Harrison County, Mississippi, which eventuated in verdict and judgment convicting them of the crime of harboring and concealing an escaped prisoner, so far depart from the accepted course of judicial procedure as to call for review by the Supreme Court of the United States, on the ground that appellants were denied procedural due process of law, in violation of the Four-

teenth Amendment to the Constitution of the United States.

2. Whether the state statutes involved in this proceeding. Section 2142.5 and 677, Mississippi Code of 1942, as construed and applied against appellants by the trial court and by the Supreme Court of Mississippi, are unconstitutional, and violate the Fourteenth Amendment to the United States Constitution.

3. Whether Section 2142.5 of the Mississippi Code of 1942, was enlarged by intendment, and as so enlarged and construed and applied against appellants, deprive them of due process of law and the equal protection of the law, guaranteed against abridgment by the Fourteenth Amendment to the Constitution of the United States.

4. Whether, as construed and applied against appellants by the trial court and by the Supreme Court of Mississippi, the affirmance of their conviction of harboring and concealing Dale Morris, an escaped prisoner, then awaiting trial for murder, encroaches upon legislative prerogatives, by including acts and conduct not encompassed within said statute, and as so construed and applied, Section 2142.5, Mississippi Code of 1942, violates the Constitution of the United States, and the Constitution of Mississippi, providing for the separation of powers, due process of law, and the equal protection of the law, and that persons charged with crime are entitled to be advised and apprised of the charge(s) against them, and are not to be convicted of crimes and offenses not included within, but rather beyond the purpose and intent of the legislative enactments.

5. Whether Section 2142.5 of the Mississippi Code of 1942, is unconstitutional, and null and void, as it has been construed and applied by the Supreme Court of

the State of Mississippi, because there is, and can be no reasonable relation between the evil aimed at and the factual situation attempted to be proved, and proved against appellants, under the circumstances of this appeal-case.

6. Whether the words "harbor" and "conceal" contained in and a part of Section 2142.5, Mississippi Code of 1942, have any reasonable relation to the actions and conduct attempted to be proved, and proved, against appellants, and whether the said statute, as construed and applied against appellants by the Supreme Court of Mississippi, deprive appellants of due process of law and the equal protection of the law, guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, because the proof, such as it is against appellants, fails to show that appellants treated the said Dale Morris, the said escaped prisoner, as a guest in their homes, or elsewhere, and that appellants did anything concerning the said Dale Morris that could remotely approach the meaning and intendment of the words "harbor" and "conceal" as defined by all the lexicographers and by the case law of the United States, both state and Federal; and more particularly because the whole case of the State of Mississippi against appellants is to the effect only that appellants obtained, or caused to be obtained, food and bedding for said escaped prisoner, and one of the appellants, viz: Preston Bellew, indicated where he, the said prisoner, might remain in the woods some considerable distance from the home of the said Preston Bellew.

STATEMENT OF THE CASE

On December 6, 1957, appellants were indicted by the Grand Jury of Harrison County, Mississippi, (R. 2-3) and charged with the crime of concealing and harboring

Dale Morris, an escaped prisoner, awaiting trial on a charge of murder, plead not guilty, and were tried to the Circuit Court of Harrison County and a jury. After a trial lasting four days, the Jury returned a verdict "guilty as charged," whereupon appellants were sentenced "to be confined in the state penitentiary of the State of Mississippi, for and during the period of three (3) years from this date, at hard labor, and shall pay all costs of this prosecution, for which let execution issue," (R. 31-32) and were released on bond of $3,000, each, pending appeal.

The evidence of the State of Mississippi was to the effect that on the night of the escape of Dale Morris, a prisoner, from the county jail of Harrison County, the appellant, Preston Bellew, with one Douglas Thomas met the escapee in a wooded section in the northern portion of said county and secluded him some three quarters of a mile from the home of said appellant and furnished him groceries and things, and said appellant continued to do so for approximately thirty (30) days, during the time he remained there. Further that besides furnishing food and water he had many talks with the said escapee concerning things of common interest and his plight.

The appellant Tommy Bellew did nothing until the last week or ten (10) days of the escapee's stay at his, the escapee's camp site in said woods. Tommy Bellew allegedly had three or four conversations with the escapee, Dale Morris, and with appellant, Preston Bellew, and others, in which he suggested plans and means to enable the escapee to make a getaway from the camp-site. These conversations were said to have taken place elsewhere and away from the camp site, with the exception of one occasion that a co-defendant, Peggy Goudelock, said she saw both appellants talk with the escapee Morris near the

camp site but she said she was some distance away. Another co-defendant, Ruth Johnson, the person who planned, with others, and executed the escape, was said to have requested appellant Tommy Bellew to help her move some of the escapee's clothes from the house to an old automobile a short distance behind it. The house in which the Johnson woman was living at the time was more than a mile from the location of the escapee's camp.

The appellant, Preston Bellew, it was testified, in pursuance of the plan to aid the escapee, led him in an automobile to a highway to the west in order that he, the escapee, could travel to evade capture.

Both appellants strongly and steadfastly denied their guilt, and any participation in anyway in the concealing and harboring of the escapee, Dale Morris, or of doing any acts which would involve them, and they produced evidence and witnesses to establish an alibi, accounting for their time and whereabouts for practically every day of the period the escapee remained in the wooded area and supported their position with testimony of good character and reputation.

Appellants, Tommy Bellew and Preston Bellew, were tried and convicted in the circuit court of Harrison County, Mississippi, on an indictment which charged that Peggy Goudelock, Preston Bellew, Tommy Bellew, Douglas Thomas and Ruth Johnson, "did unlawfully, wilfully, feloniously and knowingly conceal and harbor one Dale Morris, an escaped prisoner, charged with the crime of murder, who had been confined as a prisoner awaiting trial for murder under the order of the Circuit Court of Hancock County, Mississippi." Their motions for a new trial were overruled, and judgment was entered sentencing each of them to imprisonment in the state penitentiary for a term of three years. From such judgment they

appealed to the state supreme court, with the result that their conviction and sentence were affirmed. The opinion of the Supreme Court of Mississippi states that "in view of the nature of the questions presented for our decision on this appeal, it is necessary that a brief summary be given of their testimony (meaning the testimony of Dale Morris, Douglas Thomas, Peggy Goudelock and Ruth Johnson, witnesses for the State) and the testimony of the appellants and other witnesses." The opinion of the State court, holding that Section 2142.5, Mississippi Code of 1942, is constitutional, and does not abride rights secured by the Fourteenth Amendment of the United States Constitution, to appellants, is made an appendix to this statement. The asserted claim of unconstitutionality of Section 2142.5, Code of 1942, on the ground that said statute was enlarged and extended by intendment, and deprived appellants of due process of law and the equal protection of the law, guaranteed them by the Fourteenth Amendment, raised by motion for new trial in the trial court, briefs, suggestion of error, and amended suggestion of error in the state supreme court, was not specifically mentioned in the opinion of the Supreme Court of Mississippi, but the decision of the state court could not have been reached and rendered without considering and deciding the constitutional question.

2. The State statutes here involve.

Section 2142.5, Mississippi Code of 1942, provides that: "Every person who shall knowingly conceal or harbor any prisoner or convict who has escaped from the lawful custody of any officer, jail, prison, or the penitentiary, within this state shall be guilty of a felony and upon conviction shall be fined not less than one hundred dollars ($100.00) nor more than five hundred dollars

($500.00) *or by* imprisonment in the penitentiary not to exceed five (5) years." (Emphasis supplied)

Section 677, Mississippi Code of 1942, provides that: "The term 'felony,' when used in any statute, shall mean any violation of law punished with death or confinement in the penitentiary."

The judgment of the state court in favor of the constitutionality of said state statutes does two things: it extends Section 2142.5, Code of 1942, by intendment thus imposing restrictions on conduct not specifically enumerated in the legislative act; and legislates by judicial fiat, concerning Section 677, Mississippi Code of 1942, since the first statute authorizing fine or imprisonment for harboring or concealing any prisoner or convict does not give the court or the jury discretion to fix the punishment for such offense by imprisonment in the penitentiary, or by fine or confinement in the county jail.

The result of the state court's decision is that the criminal statutes involved in this appeal, Sections 2142.5 and 677, Code of Mississippi of 1942, Recompiled, are so construed and applied against appellants as to depart from their words and context, and to be at war with the fundamental concept of the common law that crimes must be defined with appropriate definiteness; the intent of the statute being the law, and a statutory definition of a felony should not, by construction or interpretation, be extended to cover acts or omissions of persons that are not within the intent of the statute, since only the law-making power can legally designate or define the criminal offenses for which penalties may be imposed.

3. The Appeal in the State Court.

After their motions for new trial, separately and jointly, were filed and overruled in the trial court, appellants

appealed to the state supreme court, and filed assignments of error, original and rejoinder briefs, and suggestion and amended suggestion of error.

HOW CONSTITUTIONAL QUESTIONS WERE RAISED IN STATE COURT

ORIGINAL BRIEF: "It is the constitutional right of the accused, under the organic law of the nation and of the several states, 'to be informed of the nature and cause of the accusation' against him, * * * *."

SUGGESTION OF ERROR: "In support of their Suggestion of Error in the opinion of the Court rendered herein, on, to-wit: November 3, 1958, appellants urge and show that the statute, Section 2142.5, Mississippi Code of 1942, as construed and applied against them, is unconstitutional, null and void, and violates the Fourteenth Amendment to the Constitution of the United States, * * *, and say that appellants were denied due process of law, and the equal protection of the law. The indictment returned against appellants, Tommy and Preston Bellew, and their co-defendants named in said indictment, does not charge a crime; the statute under which such indictment is brought, Section 2142.5, Code of 1942, has been extended by intendment, according to the opinion of the Court, and by the verdict of the jury and the judgment of he lower court, and as so extended is unconstitutional, and violates the Fourteenth Amendment to the Constitution of the United States, * * * *."

ADDITION TO SUGGESTION OF ERROR: "Said Section 2142.5, Code of 1942, as construed and applied against appellants, also violates the Fourteenth Amendment to the Constitution of the United States, in that it denies appellants due process of law, and the equal protection of the law, * * * *."

MOTION FOR NEW TRIAL (in trial Court): "For further grounds in support of this Motion the defendants contend that Section 2142.5 of the Mississippi Code of 1942, as amended, under which they were indicted and tried is unconstitutional in that said law in substance, contains two Crimes, one of Concealing and the other of Harboring, and does not describe the acts or things necessary to sustain such charges, and in way affords defendants information necessary in preparing their defense thereto, and did deprive them of due process of law as provided for by the Constitution of the State of Mississippi and the United States of America, and their conviction thereunder being invalid, void and of no legal effect."

In their original and rejoinder briefs, and their suggestion of error and amended suggestion of error, filed in the state supreme court, appellants raised the Federal questions here involved, contending that their conviction of the crime of harboring and concealing Dale Morris, the escaped prisoner, violated the due process clause and the equal protection clause of the United States Constitution, that they were proceeded against without due process of law and the equal protection of the law, that Section 2142.5, Code of Mississippi of 1942, and Section 677, Code of Mississippi of 1942, Recompiled, were extended by intendment, their actions and conduct testified to by state's witnesses did not show harboring and concealing Dale Morris, as the words "harbor" and "conceal" are defined by the lexicographers and decided cases, both state and Federal, and that since Section 2142.5, Code of 1942, imposes punishment as for a misdemeanor and as a felony, it must be considered to be a misdemeanor only, because the statute fails to give either the court or the jury any discretion in the matter of fixing such punish-

ment. These contentions are spelled out and argued in great detail in briefs and suggestions of error filed with the state court and in the oral argument prior to rendition of the opinion by the state court on November 3rd, 1958.

The fact that such federal questions were adequately and timely raised was recognized by the state court in its opinion (Appendix A), although the state court rendered no opinion in overruling appellants' suggestion of error and amended suggestion of error. This Court will therefore accept the recognition by the state court that the Federal questions were properly raised in the state court; and, too, the decision of the state court could not have been rendered without deciding the Federal questions.

A majority of the judges of the state court, namely, Judges Hall, Lee, Holmes, Ethridge and Gillespie, were of the opinion that the evidence was sufficient to sustain the verdict of the jury as to the appellant, Tommy Bellew, and that there was no error in the trial court's action in overruling the motion for a new trial as to him. Four of the judges of the state court, namely Chief Justice McGehee, and Judges Roberds, Kyle, and Arrington, were of the opinion that the verdict as to Tommy Bellew was contrary to the weight of the evidence and that the trial court should have sustained the motion for a new trial as to him, but said four judges did not think that this is a case for a directed verdict of not guilty as to Tommy Bellew. They were of the opinion that the evidence relating to Tommy Bellew's participation "in the concealment and harboring of Dale Morris is so slight that it cannot be said that his guilt was proved beyond a reasonable doubt," and were further of the opinion that the jurors, "having under consideration at the same time the overwhelming proof of Preston's guilt, failed to

evaluate properly the evidence upon which the State relied to convict Tommy," and said: "that another jury should be permitted to pass upon the question of Tommy's guilt separate and apart from the guilt of Preston," quoting from the Court's opinion.

The majority of the judges, however, being of the opinion "that the evidence in the record is sufficient to support the verdict of the jury as to Tommy, as well as Preston," affirmed the judgment of the trial court as to both appellants.

The state court did not render a written opinion in disposing of appellants' suggestion of error and amended suggestion of error, in which the Federal questions were posed for decision, with argument and citation of authority from the decided cases of this Court.

This Court will therefore treat the Federal questions as having been properly and timely raised in the state court, and will decide the questions, and hold that the validity of the state statutes were upheld against the claim of unconstitutionality.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

I.

THE STATE STATUTES, AS CONSTRUED AND APPLIED TO APPELLANTS, ARE INCOMPATIBLE WITH THE REQUIREMENT THAT STATE STATUTES NOT BE EXTENDED BEYOND THEIR PLAIN MEANING AND INTENDMENT.

Since the indictment returned against appellants, R. 2, charges that "* * * * * Preston Bellew, Tommy Bellew (and others), * * * * did * * * conceal and harbor one DALE MORRIS, * * *," it is necessary to a full understanding and appreciation of the Legislative intent, to

examine into the meaning—the definition—of the words "conceal" and "harbor" as used in the state statute, Section 2142.5, Code of 1942. In the early case of Fitzgerald v. Brophy, 1 Pa. Co. Ct. R. 142, the court held that "harboring" means protecting, and said that a defendant does not harbor a stray dog, so as to be liable for injuries inflicted by it, by merely permitting such dog to live under a building in his coalyard. The defendant there did more than appellants here—he permitted the dog to live under a building in his, the defendant's coalyard. In this appeal-case, Dale Morris lived out "in the woods," a great distance from the home of Preston Bellew. Within the intendment of the statute, as decided by the Court in the Fitzgerald v. Brophy Case, supra, there could be no "harboring" of Morris in the woods—not on the property of appellants. In State v. Pringle, 266 P. 196, 197, 147 Wash. 555, the court held that furnishing a shelter, lodging, and entertainment to an escaped prisoner with knowledge of all the facts thereof, though constituting "harboring," was not sufficient to constitute concealment of the prisoner or harboring for the purpose of concealment, under Rem. Como. Stat. § 2346. It follows there was no concealment of Morris according to the evidence in the case against appellants. And, too, there may be no harboring for purpose of concealment in the case against appellants. In State v. Modlin, 197 Mo. 376, 95 SW 345, 346, the Court said that "harboring thieves" means to give them shelter or lodging, or entertain them as guests. Under the facts of the case against appellants, there was no "harboring" of Morris, since he was not given shelter or lodging, and he was not entertained as a guest. In Dennis v. State, 230 Ind. 210, 102 NE 2d 650, 653, the court said that the word "harbor" as used in the statute defining accessory after the fact meant to shelter, to give refuge, to lodge, care for and protect

any person guilty of a felony. The proof, such as it is against appellants, does not show Morris was given shelter, refuge, cared for and protected. Morris was "out in the woods" some 3/4 of a mile—a great distance from the home of appellant Preston Bellew. In Firpo v. United States, C.C.A.N.Y., 251 F. 850, 853, the court held that to "harbor" as used in Criminal Code § 42, 18 U. S. C. A. § 94, providing for punishment of any one who shall harbor, conceal, protect, or assist any soldier who has deserted from service, meant to lodge, to care for, after secreting the deserter. The evidence, such as it is against appellants Tommy and Preston Bellew, does not even pretend to show that appellants lodged Morris, and that they cared for him, after it is said he was secreted; and secreted where, in the "open" woods? In Herrera v. United States, C. A. Cal., 208 F. 2d 215, 218, the court held that "harbor" means to afford lodging to; to entertain as a guest; to shelter, to receive; to give refuge to; to contain; to indulge or cherish (a thought of feeling); now usually with reference to evil, especially unlawful, act or intent. The evidence against appellants, such as it is, does not remotely prove, or even suggest, that they, or either of them, sheltered, received, gave refuge to, contained, indulged or cherished, Morris, the escaped prisoner. In United States v. Shapiro, C.C.A.-N.Y., 113 F. 2d 891, 893, construing the statute penalizing any person who may "harbor" or "conceal" any person for whose arrest a federal warrant had been issued, the Court held that the words "harbor" and "conceal" refer to some physical act tending to the secretion of the body of the offender, and mean to hide, secrete, or keep out of sight or to lodge or care for, after secreting the deserter, and said that the payment of money to a fugitive so that he may shelter, feed, or hide himself, is not within the accepted meanings of the words "harbor" and "con-

ceal," as contained in Criminal Code, § 141, 18 U. S. C. A. § 246. The evidence, such as it is against appellants, falls far short of proving the acts held by the Court, in United States v. Shapiro, supra, to be necessary to constitute the crime denounced by the statute, and the proof, such as it is against appellants, falls far short of proving the crime or crimes intended by the Legislature of Mississippi, since the words "harbor" and "conceal" must be construed in their ordinary common use and meaning. In Tygard v. Falor, 163 Mo. 234, 63 SW 672, 674, the Court held that "conceal" merely means not letting come to observation, and said that the word does not charge a criminal act. In Susnjar v. United States, C.C.A. Ohio, 27 F. 2d 223, 224, the court held that under Immigration Act, § 8 (8 U.S.C.A. § 144), prohibiting concealing or harboring, or attempt to conceal or harbor, or assist or abet others to conceal or harbor, any alien, etc., word "harbor" means to clandestinely shelter, succor, and protect improperly admitted aliens, and the word "conceal" meant to shield from observation and to prevent discovery of such alien persons. In the case against appellants the evidence, such as it is, falls far short of coming within the meaning of the words "harbor" and "conceal," as disclosed by all the decided cases.

In disposing of the argument on behalf of appellants, that the indictment against them, in the words of the statute, did not charge a criminal offense, and that the proof, such as it is, did not prove them guilty beyond a reasonable doubt, the state court cited and relief on State v. Needham, 182 Miss. 663, 180 So. 786, 116 A.L.R. 1100, holding that an indictment charging the defendant as an accessory after the fact was sufficient if it charged that the defendant wilfully aided and assisted a felon to escape after knowing that he had committed the felony,

and that an allegation of specific acts which constituted the aiding and assisting was unnecessary.

If the indictment against appellants, in the words of Section 2142.5, Code of 1942, be sufficient without more, that does not gainsay the fact that the state statute, as construed and applied against appellants, Preston and Tommy Bellew, was extended and enlarged by intendment, and as such that said statute is unconstitutional, and deprives appellants of rights guaranteed them by the due process clause and the equal protection of the laws clause of the Fourteenth Amendment.

In Rochin v. California, 342 US 165, 96 L.ed 183, 72 S. Ct. 205, 24 ALR2d 1396, the Court held that broadly speaking, crimes in the United States are what the laws of the individual states make them, subject to the limitations of Art. 1 § 10 cl. 1, of the Constitution of the United States, prohibiting bills of attainer and ex post facto laws, and of the Thirteenth and Fourteenth Amendments. In Winters v. New York, 333 US 507, 92 L.ed 840, 68 S. Ct. 665, the Court held that a penal statute must set up ascertainable standards so that men of common intelligence are not required to guess at its meaning, either as to persons within the scope of the act or as to the applicable tests to ascertain guilt. In Dill v. Hamilton, 137 Neb. 723, 291 NW 62, 129 ALR 743, the court held that a statute authorizing imprisonment for violation of its provisions imposes no restrictions on conduct except those specifically enumerated in the legislative act. That would seem to be implicit in the case of all state statutes; otherwise surely they would violate the due process clause of the Federal constitution. Although a federal statute, as distinguished from a state statute, was involved in Boyce Motor Lines, Inc. v. United States, 342 US 337, 96 L.ed 367, 72 S. Ct. 329, the Court there held that a

criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation. Such rule is axiomatic we believe—alike to both state and federal enactments.

The state court did not discuss the constitutional question posed by appellants, except to refer to and cite the State v. Needham Case, supra, 182 Miss. 663, 180 So. 786, 116 A.L.R. 1100, and quote from Bishop's New Criminal Procedure, Second Edition, Vol. 3, p. 1226, Sec. 8, par. 3. The constitutional question was implicit in the posture of the case in the state court, and the decision of the state court could not have been reached without deciding it.

II.

THE STATE STATUTES, AS APPLIED TO APPELLANTS, ARE VIOLATIVE OF THE DUE PROCESS AND EQUAL PROTECTION OF THE LAWS CLAUSES OF THE FEDERAL CONSTITUTION.

Appellants attack Sections 677 and 2142.5, Mississippi Code of 1942, Recompiled, as being violative of the Fourteenth Amendment to the Constitution of the United States, and show that the said state statutes, as construed and applied against them by the state court, deprived them of due process of law and the equal protection of the law, guaranteed against abridgment by state action. The judgment of the state court appealed to this Court was in favor of the validity of such state statutes.

This appeal-case presents a Federal question for the reason that in order to reach a correct decision of the material issues involved it is necessary to construe the Federal Constitution. Such Federal questions affirma-

tively appear from the record. They are real and substantial, and the decision of the state court on such Federal question(s) was necessary to the determination of the case.

Although this Court held, in the Winters v. New York Case, 333 US 507, 92 L.ed 840, 68 S. Ct. 665, that it would go far to uphold state or Federal statutes that deal with offenses difficult to define when they are not intertwined with limitations on free expression, and that only a definite conviction that the Fourteenth Amendment has been violated justifies reversal of the court primarily charged with responsibility to protect persons from conviction under a vague state statute, it has many times held that the unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving of punishment his conduct may be; Viereck v. United States, 318 US 236, 87 L.ed 734, 63 S. Ct. 561, and said that a criminal statute is not to be read expansively to include what is not plainly embraced within its language. Kordel v. United States, 335 US 345, 93 L.ed 52, 69 S. Ct. 106, reh den 335 US 900, 93 L.ed 435, 69 S. Ct. 298.

In the Lanzetta v. New Jersey Case, 306 US 451, 83 L.ed 888, 59 S. Ct. 618, the Court held that a statute penalizing "gangsters" and declaring that "any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime," is a gangster, is so vague and uncertain in its definition of the offense as to be repugnant to the due process clause of the Fourteenth Amendment.

The state statutes under attack in this appeal-case by appellants, Section 2142.5, Mississippi Code of 1942, and Section 677, Mississippi Code of 1942, are so vague and uncertain in the definition of the offense to be punished, and in the punishment, as to be repugnant to the due process clause of the Fourteenth Amendment. Surely, too, according to the definitions of "harbor" and "conceal" as contained in the dictionaries in common use, all of the law dictionaries, and the decided cases, both state and Federal, appellants did none of the things intended by the legislature of Mississippi towards the escaped prisoner, viz: Dale Morris. They did not entertain him as a guest in their homes, they did not cherish him; they did not succor and shield him. If the state statute, as written, is good against this attack, then it is bad as construed and applied against appellants. The state court has extended Section 2142.5, Code of 1942, by intendment, contrary to the decided cases.

The opinion of the state court to the effect that the statute is not unconstitutional, for the reason that when the court or the jury is given the discretion to fix the punishment for an offense by imprisonment in the penitentiary, fine, or by confinement in jail, such an offense is held to be a felony regardless of the penalty actually imposed, overlooks the fact that the statute under attack does not give the court or the jury any discretion to fix the punishment, as was the case in State v. Sansome, 133 Miss. 428, 97 So. 753, and Ellis v. State, 203 Miss. 330, 33 So. 2d 837, relied on by the state court to sustain its opinion.

The opinion of the state court, to the effect that the indictment returned against appellants is sufficient under the rule of the State v. Needham Case, supra, 182 Miss. 663, 180 So. 786, 116 A.L.R. 1100, is contrary to the

decision in State v. Winslow, 208 Miss. 753, 45 So. 2d 474, contrary to the decision in Daisey Ratcliff v. State of Mississippi, ... Miss. ....., 107 So. 2d 728, and Mary Rose v. State of Mississippi, ... Miss. ....., 107 So. 2d 730, and deprives appellants of the equal protection of the law, guaranteed by the Fourteenth Amendment of the Constitution of the United States.

If the words "harbor" and "conceal" as contained in Section 2142.5, Mississippi Code of 1942, are active verbs, which have the prisoner (fugitive) as their object, as held in United States v. Shapiro, 113 F. 2d 891, 130 A.L.R. 147, and recognized by the court in Firpo v. United States, 2 Cir., 261 F. 850, 851, it is too plain for words that the statutory language does not permit of the interpretation that the legislature of Mississippi intended to punish every form of aid, assistance and help to an escaped prisoner. As was said in United States v. Shapiro, supra, C.C.A. 2d, 113 F.2d 891, 130 ALR 147; "As already pointed out, any degree of assistance was made criminal in the matter of aiding an escape, but when dealing with preventing detection of a fugitive, Congress used more limited language; hence differences in degree of the assistance rendered cannot be brushed aside. As the Supreme Court said in United States v. Weitzel, 246 US 533, 543, 38 S. Ct. 381, 383, 62 L.ed 872; 'Statutes creating and defining crimes are not to be extended by intendment because the Court thinks the legislature should have made them more comprehensive.' Numerous similar warnings could be cited, but it will suffice to mention United States v. Chase, 135 US 255, 261, 10 S. Ct. 756, 34 L.ed 117; United States v. Harris, 177 US 305, 310, 20 S. Ct. 609, 44 L.ed 780. No problem is here involved of modernizing the meaning of the statute in order to reach a new form of the original evil intended to be suppressed, for the

form of assistance under discussion could be as old as money itself. * * *."

In reversing the judgment in the Shapiro Case, 113 F. 2d 891, the Court held the statute could not be interpreted to cover a payment of money to be used by a fugitive in any way he might choose in order to avoid arrest, and said the demurrers to the indictments should have been sustained.

The impact of the state court's opinion and judgment is necessarily to the effect that the indictment was sufficient to charge the crime of harboring and concealing Dale Morris, and that the statutory language of Section 2142.5, Code of 1942, was sufficient to punish every form of assistance to Dale Morris, the escaped prisoner, contrary to the majority rule of state and Federal cases.

III.

THE STATE COURT'S DECISION THAT THE STATE STATUTES INVOLVED ARE CONSTITUTIONAL ON THE BASIS STATED IN THE OPINION CANNOT BE SUSTAINED AGAINST ATTACK THAT SUCH STATUTES AS CONSTRUED AND APPLIED ABRIDGE THE DUE PROCESS AND EQUAL PROTECTION OF THE LAW CLAUSES OF THE FEDERAL CONSTITUTION.

The state court's opinion states that there is no merit in the contention of appellants that Section 2142.5, Code of 1942, is unconstitutional "for the reason that it contains two subject matters and prescribes punishment for a misdemeanor and a felony in one statute," but the court did not decide the constitutional questions of due process of law and the equal protection of the laws. The same is true as concerns the attack on the indictment

returned against appellants and the statutes under which said indictment was drawn; appellants contended in the state court that the criminal statutes invoked against them were so interpreted as to depart from the words and context of said statutes; and the judicial enlargment of such criminal statutes by state court interpretation is at war with the fundamental concept of the common law that crimes must be defined with appropriate definiteness, as held by this Court in Pierce v. United States, 314 US 306, 86 L.ed 226, 62 S. Ct. 237.

When substantial constitutional rights are asserted this Court exercises its own independent judgment as to both the facts and the law. A substantial federal question exists where state laws as construed and applied are attacked as being unconstitutional, and the decision of the state court is in favor of the validity of such statutes.

The legislative power of the states to define what acts shall constitute criminal offenses and what penalties shall be inflicted on offenders, must be exercised subject to constitutional guaranties of due process of law, under the Fourteenth Amendment of the United States Constitution, and the equal protection of the laws clause of said Amendment. Rochin v. California, 342 US 165, 96 L.ed 183, 72 S. Ct. 205, 25 ALR2d 1396.

The opinion of the state court is put upon a basis not adequate to sustain it, for two reasons: (1) Appellants were denied due process of law, and (2) the equal protection of the laws guaranteed them by the Fourteenth Amendment of the Constitution of the United States.

We have shown that the state statutes, as construed and applied against appellants were unconstitutional—they were extended by intendment.

Beginning in the year 1908 with Hatton v. State, 92 Miss. 651, 46 So. 708, the state court has consistently held its function was to construe penal statutes as they were enacted, and not to enlarge their scope to meet the gravity of each particular offense. Continuously since Stewart v. State, 95 Miss. 627, 49 So. 615, the state court has held that criminal and penal statutes are strictly construed, in favor of the accused and against the State. And without interruption since the state court's decision in State v. Traylor, 100 Miss. 544, 56 So. 521, sug of error denied (1912) 57 So. 1, the Supreme Court of Mississippi has held that while criminal statutes may be contracted or expanded by interpretation, so as to exempt from punishment those not within their spirit and purpose, such statutes cannot be expanded so as to impose punishment upon one not within their strict letter. The state rule has continued unabated through the decisions in Daisey Ratcliff v. State of Mississippi, decided December 15, 1958, not yet reported in the official state reports, but appearing in 107 So. 2d 728, and Mary Rose v. State of Mississippi, decided December 15, 1958, not yet reported in the official state reports, but appearing in 107 So. 2d 730. In the Ratcliff Case the state court said: (p. 730, 107 So. 2d)

"* * * This is a plain requirement of the statute. It may be that the legislature intended to say 'incestuous or miscegenetic and void.' But this Court cannot amend the act so as to make persons subject to punishment thereunder who are not otherwise punishable by the express terms thereof.

"It is settled law that penal statutes must be strictly construed. We must enforce the statute as written, not as we think the legislature might have intended to write it; for the question is not what the legislature intended

to enact, *but what is the meaning of that which it did enact.* For an act to constitute a crime, it must come within both the letter and spirit of the act. * * * * These principles are so universally accepted that no citation of authority is necessary. * * *. Reversed and appellant discharged."

It is apparent, and obvious too, that the state opinion and judgment deny appellants the equal protection of the laws; that court would enforce one rule for others and a different rule for appellants. The State v. Needham Case, 182 Miss. 663, 180 So. 786, 116 A.L.R. 1100, cited by the court to sustain its opinion, is not in point. In that case the indictment charged that Charles Needham, "* * * * well knowing that one Daisey Howard had committed a felony, to-wit: that the said Daisey Howard had theretofore wilfully, unlawfully, feloniously and of her malice aforethought killed and murdered one Carrie McWilliams and one Carrie Floyd, * * * did, then and there, wilfully, unlawfully and feloniously aid and assist the said Daisey Howard in escaping and avoiding trial, conviction and punishment for her said crime of murder, against the peace and dignity of the State of Mississippi." Holding the charge sufficient the Court said: "* * * Since there is no way in which a person can wilfully aid and assist a felon to escape, after knowing that he has committed the felony, and then be innocent of the charge of having become an accessory after the fact, it follows that the allegation to the effect that he rendered such aid and assistance under these circumstances is sufficient. * * *."

CONCLUSION

Appellants respectfully suggest that these appeals bring before this Court federal questions under the Constitution of the United States that are far-reaching and

important, both in terms of legal principles and practical impact upon citizens of the state who might similarly simply furnish food and clothing to escaped prisoners, and do nothing more; and it is believed that enough has been said to demonstrate that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution and decision by this Court.

Respectfully submitted,

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APPENDIX A

OPINION OF SUPREME COURT OF MISSISSIPPI

IN THE SUPREME COURT OF MISSISSIPPI

NO. 40,863

PRESTON BELLEW AND TOMMY BELLEW

VS

STATE OF MISSISSIPPI

KYLE, JUSTICE:

The appellants, Preston Bellew and Tommy Bellew, were tried and convicted in the Circuit Court of Harrison County on an indictment which charged that Peggy Goudelock, Preston Bellew, Tommy Bellew, Douglas Thomas and Ruth Johnson, "did unlawfully, wilfully, feloniously and knowingly conceal and harbor one Dale Morris, an escaped prisoner, charged with the crime of murder, who had been confined as a prisoner awaiting trial for murder under the order of the Circuit Court of Hancock County, Mississippi." The two appellants filed motions for a new trial. The motions were overruled, and a judgment was entered sentencing each of them to imprisonment in the state penitentiary for a term of three years. From that judgment they prosecute this appeal.

The record shows that Dale Morris had been indicted by the grand jury in the Circuit Court of Hancock County, at the March 1956 term of the court, on a charge of murder in the killing of Charlie Flink. At the time of his escape he was confined in the Harrison County jail at

Gulfport, under an order of the court, to await trial on the murder indictment. Morris escaped from the county jail sometime during the night of June 6, 1957, and remained at large several weeks before he was recaptured and returned to the Harrison County jail. Claude Miller, a deputy sheriff who lived at Long Beach, testified that when he left the jail to go to his home in the late afternoon of June 6, Morris was confined in his security cell on the east side of the third floor of the jail. Miller stated that he was notified of the escape about one o'clock that night; and that he went to the jail immediately and found that a hole had been cut in the heavy mesh wire enclosure, referred to in the record as the sun cage, on the third floor of the building. The hole was 16 to 20 inches in width. There was one door leading out of the cage, and that door was locked when Miller arrived at the jail.

Dale Morris, Douglas Thomas, Peggy Goudelock and Ruth Johnson testified as witnesses for the State; and in view of the nature of the questions presented for our decision on this appeal, it is necessary that a brief summary be given of their testimony and the testimony of the appellants and other witnesses.

Dale Morris testified that he was confined in a cell on the third floor of the jail with several other prisoners, including Aden Bellew, a brother of the appellants, during the night of June 6, and that he got the wire cutters, which he used in effecting his escape, from Aden Bellew. Morris stated that he was up on the sun deck, and that he clipped the wire and got out of the cage and came down the wall. He then crossed over the street, and found an automobile waiting for him. The driver of the car was a colored man whose name he did not remember. They drove for about half an hour, and stopped in the woods close to Preston Bellew's mailbox, which was

located several miles north of the City of Biloxi in the White Plains Community. Morris got out of the car and whistled. Someone answered, and Preston Bellew and Douglas Thomas appeared on the scene with sacks of groceries and other things. The colored man drove off, and left Morris there with Bellew and Thomas. The two men carried the groceries to a place about 200 yards from the road, and told Morris to stay there that night and there would be somebody over in the morning with some water. Morris stayed there that night, and the next day Douglas Thomas brought him some water, and that evening Preston Bellew moved him over to a heavily wooded area where he set up camp. Morris remained there in the camp approximately one month. Morris stated that Preston Bellew brought him a 22 Woodsman automatic pistol, and at a later date a 45 Colt automatic pistol. The two weapons were identified by Morris and offered in evidence, and Morris stated that they were the weapons which were in Peggy Goudelock's Pontiac automobile when he and Peggy separated in Wyoming sometime after he and Peggy left the State of Mississippi. Morris stated that Tommy Bellew came out to Preston Bellew's place twice while he was encamped in the woods, and Morris discussed with Preston and Tommy the best route to take in order to make his escape from Mississippi.

Morris stated that he had Ruth Johnson call Peggy Goudelock, who was in California at that time, and Peggy came and stayed out there with him four or five days, and then he and Peggy left and went west. Peggy arrived at Preston Bellew's house late at night, and Preston carried Peggy over to Morris' camp. The next morning Morris went with Preston over to Preston's house, and he and Preston pulled Peggy's car over behind some brushes and Morris covered it over in part with brush. Morris

stated that, when he and Peggy were ready to leave, Preston Bellew and Ruth Johnson, at Tommy Bellew's suggestion, showed them the way out. "They drove through the back road to where we could find the highway." Morris and Peggy then crossed Highway 49 and went on to Poplarville. Peggy's car had a Mississippi license plate on it when Peggy got to the camp; and Preston Bellew and Ruth Johnson got some Louisiana license plates off of another car, and Morris put the Louisiana license plates on Peggy's car. Morris stated that it was more than a month after he escaped from the Harrison County jail before he left Mississippi.

On cross-examination Morris was asked whether he had given the district attorney a statement of the facts in the case. His answer was that he had related the facts as they happened. He did not know whether the facts had been set down in writing or not; but he had not signed a statement of any kind. He admitted that he had entered a plea of guilty to a charge of manslaughter in the killing of Charlie Flink; but he specifically denied that he had made a deal with the district attorney, by the terms of which he would be permitted to plead guilty of manslaughter in the Flink murder case, and in return therefor he would give information about Preston Bellew and Tommy Bellew being involved in his staying out in the woods near Preston's house after his escape. Morris stated that he knew that the Negroes were waiting for him in the automobile when he escaped from the jail. The Negro man who was driving the car had been described to him by Aden Bellew, and the car had also been described to him. After they got out in the country Johnnie told him that Preston Bellew would be there at his mailbox to meet him. Morris stated that he had seen Douglas Thomas at the county jail, and he had seen and talked to

Preston Bellew once or twice at the jail. He stated that Preston Bellew and Douglas Thomas both had sacks on their backs—sacks of groceries and bedding, when they appeared at the road side near Preston Bellew's mailbox the night that he escaped from the county jail. He stated that Preston Bellew came over to his camp almost every day while he was there; and Morris went to Preston Bellew's house one time. It was about one-fourth of a mile from the place where he got out of the automobile to Preston Bellew's house. Morris stated that Tommy Bellew did not come to see him at the camp until four or five days before he left there. He saw Tommy one other time at the house. Morris admitted that he had been convicted of desertion from the U. S. Marine Corps and had received a dishonorable discharge; that he had served a three-year term in prison for assault with intent to kill in Missouri; and that he had been sentenced to imprisonment for a term of 12 years for manslaughter as a result of the killing of Charlie Flink.

Douglas Thomas testified that he was living in the White Plains district in Aden Bellew's house, which was about one-half mile from Preston Bellew's house, at the time Morris escaped from the county jail; that Ruth Johnson, his sister, who was living in the Aden Bellew house at that time, had left word for him to help Preston that night; that he went over to Preston Bellew's house about 11 o'clock; and that he and Preston took some sacks out of a car that was parked in front of Preston's mailbox. Johnnie Brewer, a Negro man, was to bring Morris out there. Ruth had told Douglas what they were going to do, and Douglas and Ruth had gone over the route with Johnnie a day or two before, and had shown Johnnie where to go. Ruth had shown Johnnie where he was to park his car and pick up Dale Morris behind the "Daily

Herald'' office in Gulfport; and Douglas and Ruth had shown Johnnie how to drive out to Preston Bellew's mailbox. Douglas stated that Johnnie drove up to the mailbox about midnight and blinked the lights of his car and blew his horn, and Dale Morris jumped out. Preston and Douglas then took Morris into the woods across the road and left him there. Douglas went back the next morning at Preston Bellew's request and carried Morris some water, and Douglas went back the next night and carried Morris some food. He never went back to the camp again. Douglas stated that he had been indicted for his part in the affair and had entered a plea of guilty and agreed to testify for the State. He had never been convicted of any crime before that.

Peggy Goudelock testified that she had lived in Gulfport during the last several years, and that she became acquainted with Dale Morris when he was in the Harrison County jail. She learned of his whereabouts three or four weeks after his escape. She was in California at that time, and Ruth Johnson called her and told her where Morris was. She had been advised by the F.B.I. that the authorities were looking for Morris. Peggy stated that she left California on Wednesday and arrived in Gulfport Friday afternoon. She got in touch with Ruth Johnson immediately. Ruth was staying at the big house on the Aden Bellew place in the White Plains community. Peggy and Ruth drove down the road a short distance to Preston Bellew's house, which was a smaller house, and Preston Bellew came out. Preston and Peggy then walked over into the woods where Morris was camping, and Peggy stayed there that night. Peggy testified that she saw Tommy the first time in the afternoon of the day following her arrival. She walked with Dale over to the well where Dale got water. Dale left her at the well,

and walked over toward the big house. He met Preston and Tommy Bellew about half way between the well and the big house, and the three men talked among themselves 30 or 40 minutes. There was another conference between Preston and Tommy Bellew and Morris the next afternoon, which lasted 30 to 40 minutes. Peggy stated that when she and Morris got ready to leave the camp three or four days after Peggy's arrival, there was some discussion among them and Tommy and Preston Bellew as to the best route for them to take to get to the highway and across the highway without going back through town. Peggy's car had been hidden back under some trees, and covered with limbs and branches so that it could not be seen from the air; and during the afternoon before she and Morris left, Preston Bellew and Morris helped her clean the car. Tommy Bellew was not there at that time. Peggy and Morris left the camp at night. Ruth Johnson and Preston Bellew drove ahead of them in Ruth's car to show them the way out to the highway. They went through the back way until they got to Highway 49. They crossed Highway 49 at Lyman and passed through Poplarville. Ruth Johnson and Preston Bellew had obtained a Louisiana license plate for Peggy's car, and the Louisiana license plate was put on Peggy's car before they left the state.

On cross-examination Peggy stated that when she and Morris left Mississippi they drove westwardly through Louisiana and Texas, and she and Morris were married on the trip. She was asked whether she had made a statement to the district attorney or the sheriff, or any other law enforcement officer, relating to her participation in Morris' escape and concealment. She stated that she had made and signed such a statement in the presence of Mr. Wittmann, the sheriff, and Mr. Hewes, the county

attorney. Mr. Holleman was not present. She was asked whether she put anything in that statement with reference to Tommy Bellew. She stated that the statement showed that she saw Morris talking to the two men from a distance, that she had seen Tommy Bellew up there at the jail on visiting days; and that she recognized him and Preston Bellew when she saw Morris talking to them. Peggy stated that she did not see Tommy Bellew out near Morris' Camp.

Ruth Johnson testified that the wire cutters which had been introduced in evidence were wire cutters which she had gotten from Tommy Bellew at his home in Biloxi and had carried to the jail in her purse. She had asked Tommy Bellew for them, and Tommy went across the street and got them out of an old truck. She told Tommy that Aden wanted them, meaning Aden Bellew who was in jail at the time. She stated that she knew Johnnie Brewer, the Negro that carried Morris away from the jail when he escaped, and that she showed Johnnie where to go and where to take Morris after his escape. She stated that Aden Bellew gave her a list of groceries and supplies and told her to take them to Preston Bellew's house, and that she got the groceries and supplies and took them to Preston Bellew's house, and put them in a Henry J. car sitting there in front of the house. She stated that she saw Morris with Preston Bellew behind the big house on Aden Bellew's place about two weeks after he broke jail. She stated that she saw Tommy Bellew at the Bellew place on two occasions, once when he came there to help her move some clothes of Dale Morris that Peggy Goudelock had left with her when she left to go to California and had asked her to keep. She and Tommy took the clothes and put them in a Hudson car underneath some old clothes. Aden Bellew had told her to

move the clothes; he didn't want to have himself connected with the matter. That was after Morris' escape. Ruth stated that she called Peggy Goudelock in California, and that after Peggy arrived in Gulfport she came out to White Plains where Ruth was living. Ruth was asked whether she had ever seen the two pistols which had been identified by other witnesses. She stated that she had seen one of them at Aden Bellew's house, and that Preston Bellew had taken the pistol and carried it to Morris. She knew nothing about the 45 automatic. Ruth stated that Tommy Bellew never carried any groceries out to the camp to her knowledge; and that she never heard any discussion with him while he was out there about Morris' escape. She was asked whether she remembered anything that was said about the escape and flight of Morris. Her answer was, "Yes, I do. Preston Bellew said to Dale Morris, 'I think you owe that much to Aden, to get rid of them for him.' " At this point the defendants' attorney objected to the question and the answer and made a motion for a mistrial. The court sustained the objection to the statement, "to get rid of them." The court overruled the motion for a mistrial. She stated that she heard the conversation between Preston and Tommy and Peggy and Dale Morris about how Morris was to leave. Preston and Tommy were telling Morris the best route to take to get out of there. Peggy's car was hidden close to Preston Bellew's house. Ruth was there the night Peggy and Morris left, and she and Preston Bellew showed them the way out. They drove over to Highway 49, and when they hit Highway 49 they told Peggy and Morris to go straight ahead.

Sheriff Joe Wittmann testified that Morris was arrested in Long Beach, California, sometime after his escape, and was brought back to Mississippi to await trial on the

murder charge. The sheriff stated that, after Morris' return, he went with the sheriff and his deputies to the camp site in the White Plains community and showed the officers where the wire clippers, which he had used to effect his escape from the county jail, were hidden, and the officers found the clippers by the butt of a tree covered over with pine straw. The camp was in a wooded area about half a mile from Preston Bellew's house. The sheriff stated that he obtained possession of the 22 pistol, which Morris had with him when he left the state, from a gun shop in Idaho Falls, and that he got the 45 Colt pistol which Morris had with him from a U. S. Marshal in Idaho Falls.

Both of the appellants testified in their own behalf, and both denied specifically that they had anything to do with the harboring and concealment of Dale Morris after his escape from the county jail.

Tommy Bellew testified that he was living in Biloxi, and had lived there during the last five years. He owned his own home, and was engaged in the operation of a gasoline service station for the Gulf Coast Oil Company. He had been engaged in that business 7½ years. He had a wife and two children. He went to work at 4:00 o'clock in the morning, and got off from work about 1:00 o'clock in the afternoon. Tommy stated that he had made two trips to the old home place, known as the Aden Bellew place, during the early summer. He made one trip up there to fix an electric wire for Ruth Johnson, so that she could see how to milk her cow. His wife and one of his children went with him on that trip. He made another trip up there with Grady Rushing to move Ruth Johnson when she wanted to leave the Aden Bellew place. Tommy stated that he had no information that Dale Morris was anywhere in that area at that time; and he

specifically denied that he had gone up there on one occasion to move some clothes that belonged to Dale Morris. He admitted that he had visited his brother Aden Bellew at the jail every Sunday; but he denied that he knew anything about Dale Morris, or that he had any dealings with Dale Morris after his escape from the county jail. He denied that Peggy Goudelock had seen him and Preston Bellew and Dale Morris talking behind Aden Bellew's house in the White Plains community; and he denied that he had ever seen the wire cutters which Ruth Johnson testified he had given her. He denied that he had anything to do with directing Dale Morris and Peggy Goudelock as to the route which they should take when they left the camp.

Preston Bellew testified that he lived about 12 miles north of Biloxi on Highway 57; that he had four children, all of whom were grown; that he had been working for the county as a member of the road crew of District No. 5 for more than a year; and that he was working for the county at the time it was said that Dale Morris escaped. He stated that he had never seen Dale Morris in the White Plains community. He denied that he had met Dale Morris with some sacks the night that he escaped from the county jail, or that he had carried him any food or water, or had done anything to help conceal him from the authorities. He denied that he had ever given Dale Morris a pistol of any kind. He denied that he had anything to do with changing the automobile license plates on Peggy Goudelock's car; and he denied that he and Tommy had given any directions to Peggy and Morris as to how to get out of the White Plains community, or how to get to the highway.

Mildred Bellew, Tommy Bellew's wife, testified that she made two trips with Tommy to the Bellew place in

the White Plains community during the summer. One time Tommy went out there to fix an electric wire that had fallen down, and she went with him. The next time Tommy went out there to move Ruth Johnson to her sister's home. On that occasion Mildred went in Ruth Johnson's car with Ruth, and Tommy and Grady Rushing came later with a truck. Lorenzo Krohn, the district manager of the Gulf Coast Oil Company, testified that Tommy had been working for the Gulf Coast Oil Company for about 7½ years, and that he did not remember Tommy ever missing work until he got put in jail as a result of the charges growing out of Dale Morris' escape. Tom Gartman, who was foreman of the road crew of Supervisor's District No. 5, testified that Preston Bellew was working for him as a member of the road crew at the time Dale Morris escaped; and that Preston went to work at 7:00 o'clock in the morning and put in straight time during working hours. Gartman stated that he knew nothing about Bellew's activities after work hours. Mary Bellew, Preston Bellew's daughter-in-law, testified that she lived about a quarter of a mile from Preston Bellew's house on Highway 57; that she visited over at her father-in-law's place quite often during the summer; and that she never saw Peggy Goudelock over there, and she did not know that Morris was out there. David Brown, Preston Bellew's son-in-law, testified that he was living with Preston Bellew back in June, and there was no automobile placed on the property near Preston Bellew's residence at that time. If any such automobile had been there he could have seen it. Several witnesses also testified as character witnesses for Tommy and Preston.

The first point argued by the appellants' attorneys as ground for reversal of the judgment of the lower court is that Section 2142.5, Code of 1942, the statute under which the indictment was returned, is unconstitutional for the

reason that it contains two subject matters and prescribes punishment for a misdemeanor and a felony in one statute. But we think there is no merit in that contention.

"Crimes are classified by some statutes according to the punishment actually imposed. Some courts have declared that where a crime may be punished as a misdemeanor or as a felony, it will be considered to be a misdemeanor only. * * * In a majority of jurisdictions, however, when the court or the jury is given the discretion to fix the punishment for an offense by imprisonment in the penitentiary, fine, or by confinement in jail, such an offense is held to be a felony regardless of the penalty actually imposed." 14 Am. Jur. 763, Criminal Law, par. 13.

This Court has adopted the majority rule that, when the court or the jury is given the discretion to fix the punishment for an offense by imprisonment in the penitentiary, or by fine or confinement in the county jail, such an offense is held to be a felony regardless of the penalty actually imposed. State v. Sansome, 133 Miss. 428, 97 So. 753; Ellis v. State, 203 Miss. 330, 33 So. 2d 837.

It is next argued by the appellants' attorneys that the indictment returned against the appellants in this case is insufficient to charge an offense under Section 2142.5, Code of 1942, for the reason that the indictment fails to set forth the means by which the appellants concealed and harbored the escaped prisoner. But that contention was made and rejected by this Court in State v. Needham, 182 Miss. 663, 180 So. 786, in which the Court held that an indictment charging the defendant as an accessory after the fact was sufficient if it charged that the defendant wilfully aided and assisted a felon to escape after knowing that he had committted the felony, and that an allegation of specific acts which constituted the

aiding and assisting was unnecessary. The rule announced in that case finds ample support in the authorities cited in the opinion rendered by the Court in that case. The rule itself and the reason therefor are stated in Bishop's New Criminal Procedure, Second Edition, Vol. 3, p. 1226, Sec. 8, par. 3, as follows: "It is in no case necessary to use the word 'accessory' in the indictment, or to set forth the means by which the accessory before the fact incited the principal to commit the felony, or the accessory after received, concealed, or comforted him; for it is perfectly immaterial in what way the purpose of the one was effected, or the harboring of the other secured; and as the means are frequently of a complicated nature, it would lead to great inconvenience and perplexity if they were always to be described upon the record."

It is next argued that the court erred in overruling a motion made by the appellants' attorney at the beginning of the trial that the district attorney be required to produce, and to make available for the inspection of the appellants' attorney, statements made by some of the State's witnesses to the district attorney or the county attorney relative to the appellants' actions in concealing and harboring Dale Morris during the four weeks period immediately following his escape from the Harrison County jail. The purpose of the motion was to require the production of statements previously given to the State's attorneys by Dale Morris, Douglas Thomas, Peggy Goudelock and Ruth Johnson, upon which the appellants' attorney assumed the indictment was based, and which might be useful to the appellants' attorney in cross-examining the witnesses.

We think there was no error in the action of the trial judge in refusing to order the district attorney to produce

and make available for inspection by the appellants' attorney statements given by the State's witnesses to the prosecuting attorney before the trial. This Court has held in several cases that the defendant in a criminal case is not entitled to a bill of particulars. Westbrooks v. State, 76 Miss. 710, 25 So. 491; Quick v. State, 133 Miss. 634, 98 So. 108; Sanders v. State, 141 Miss. 289, 105 So. 523; McDaniel v. State, 191 Miss. 854, 4 So. 2d 355; and this Court said in McDaniel v. State, supra, "* * * in the absence of a statute so requiring, the state is not bound to furnish to a defendant the names of the state's witnesses. 14 Am. Jur. pp. 913, 914, and the authorities there cited."

The general rule relating to the right of the accused to demand that he be permitted to inspect statements made by witnesses to the State's attorney before the trial in a case of this kind is stated in 23 C.J.S., 263, Criminal Law, par. 955, as follows:

> "As a general rule, accused is not entitled to an inspection of the prosecution's evidence; the remedy is not available for exploratory purposes. It may not be had of private documents, or of documents or articles which are not evidence material to the crime or defense and which would not be admissible or would be admissible only by way of impeachment. Thus an inspection may not be had before trial of mere mnemonic instruments, whereby the prosecutor may refresh his recollection and that of the witnesses, or of statements by witnesses or codefendants or participants in the crime."

See also People v. Nields (1924), 70 Cal. App. 191, 232 P. 985; State v. Furthmeyer (1929), 128 Kan. 317, 277 P. 1019; State v. Richetti (1938), 342 Mo. 1015, 119 S.W. 2d 330; State v. Hall (1918), 55 Mont. 182, 175 P. 267;

People ex rel. Lemon v. State of New York (1927), 245 N.Y. 24, 156 N.E. 84; Tinker v. State (1923), 95 Tex. Cr. 143, 253 S.W. 531; U. S. v. Simonds (1945), C.C.A. N.Y., 148 F. 2d 177; State v. Zimnaruk (1941), 128 Conn. 124, 20 A. 2d 613; People v. Moretti (1955), 6 Ill. 2d 494, 129 N.E. 2d 709; State v. Kelton (Mo. 1957), 299 S.W. 2d 493; State ex rel. Page v. Terte (1930), 25 S.W. 2d 459, 324 Mo. 925; State v. Pamhianchi (1953), 139 Conn. 543, 95 A. 2d 695; People v. Marshall (1958), 5 App. Div. 2d 352, 172 N.Y.S. 2d 237; People v. Riser (1956), 47 Cal. 2d 566, 305 P. 2d 1, cert. den. 353 U. S. 930 (1957), 77 S. Ct. 721, 1 L. Ed. 2d 724. See also Note: Virginia Law Review, October 1958, Vol. 44, p. 997.

In the case of People ex rel. Lemon, Dist. Atty. v. Supreme Court of the State of New York (1927), 245 N.Y. 24, 156 N.E. 84, affirming 219 N.Y.S. 892, 219 App. Div. 725, the Court held that in a criminal prosecution, documents and memoranda in the possession of the district attorney, not themselves admissible in evidence, were not subject to inspection by the defendant; hence enforcement of an order that such documents be filed in the office of the county clerk was properly restrained by an order of prohibition. In that case the Court in its opinion, written by Cardoza, C. J., said: "Documents are not subject to inspection for the mere reason that they will be useful in supplying a clew whereby evidence can be fathered. Documents to be subject to inspection must be evidence themselves. Falco v. New York, N.H. & H.R. Co., 161 App. Div. 735, 737, 146 N.Y.S. 1024; Woods v. Figaniere, 25 How. Prac. 522, 526, 527; Knight v. Marquess of Waterford, 2 Y. & C. Ex. 22, 36. No precedent can be found even in civil causes for compelling disclosure, in advance of the trial, of the office notes or memoranda prepared by an attorney after consultation with

his witnesses, and summarizing his understanding of the testimony that is likely or expected."

In the case of People v. Moretti (1955), 6 Ill. 2d 494, 129 N.E. 2d 709, the Court held that where, in a murder prosecution, the prosecution introduced into evidence, without objection, a transcript of the defendant's testimony before the grand jury and was permitted to read to the jury in the murder prosecution most of the transcript, except part where the defendant claimed that he was on a narcotics investigation, and the defendant was given access to the same transcript, the court did not err in refusing the defendant's motion that the prosecution be required to produce a full and complete record of the grand jury proceedings, as well as all extrajudicial statements made by any and all witnesses in the case. In the case of United States v. Simonds (1945), 148 F. 2d 177, the Court held that where the witness has not used a statement previously given to the district attorney to refresh the witness' recollection and there was no discrepancy between the witness' testimony and the statement, the court's refusal to require delivery of the statement to counsel for the defendant who wanted it for use in cross-examination was not error. In the case of State v. Hall (1918), 55 Mont. 182, 175 P. 267, the Court held that under Rev. Codes, Sec. 7138, providing for the inspection of paper in the possession of the other litigant, and Sec. 9279, making civil rules of evidence applicable in criminal cases, the prosecutor need not allow the defendant to inspect an ex parte written statement of the circumstances of the crime by the prosecuting witness; such statement being inadmissible as substantive evidence.

In the case of State v. Kelton (Mo. 1957), 299 S.W. 2d 493, the Court held that in a homicide prosecution the

trial court did not err in quashing on motion of the state the defendant's subpoena to compel the shorthand reporter to produce in evidence a sworn question and answer statement taken from the defendant by the prosecuting attorney on the day of the homicide. 42 V.M. V.A.M.S. Supreme Court Rules, rule 25.19. In the case of Tinker v. State (1923), 95 Tex. Cr. 143, 253 S.W. 531, the Court held that refusal of motion to compel state's attorney to furnish all written statements made by any witness in the case presents no error where such statements were not before the jury. In the case of State v. Zimnaruk (1941), 128 Conn. 124, 20 A. 2d 513, the Court held that in a prosecution for indecent assault where the shorthand notes and transcript of the complainant's statements made prior to the trial in response to questioning by the county detective were in court in the possession of the state, and there was no evidence that notes or transcript contained any statement contradictory to testimony given by the complainant as a witness for the state, the court did not err in refusing to require the production of such notes and transcript for any effect the possible presence therein of any contradictory statements might have upon the credibility of the complainant.

We have found no case in our own reports or any other state reports in which the Court has held that the trial judge committed reversible error in refusing to compel the prosecuting attorney to produce for inspection by the defendant's attorney before the State's witnesses had been called to testify statements previously given by the witnesses to the prosecuting attorney relative to the defendant's actions in the commission of the crime charged against him.

In the case that we have here, Peggy Goudelock was questioned at length by the appellants' attorney on cross-examination about the statement which she had made in the presence of the sheriff and the county attorney; and there is nothing in the record to indicate that her statement to the officers before the trial differed in any respect from the statement which she made to the jury during the trial. The sheriff testified later for the State and was not questioned by the appellants' attorney about the statement which Peggy had made to him and the county attorney. Dale Morris stated on cross-examination that he had related to the district attorney the facts as they had happened, but he had signed no written statement. Douglas Thomas and Ruth Johnson were not questioned about statements which they had made to the prosecuting attorney before the trial. None of the statements made by the witnesses to the State's attorneys before the trial were offered in evidence or used by the witnesses to refresh their recollection; and we think there was no error in the court's refusal to enter an order requiring the district attorney to produce such statements, or his own notes or memoranda concerning the facts to be proved by each witness, and make the same available for the use of the appellants' attorney on his cross-examination of the witnesses, and if there was error, such error was harmless.

It is next argued on behalf of the appellants that the trial court erred in admitting evidence relating to the commission of other crimes by the appellants' coindictees, and in admitting evidence relating to the appellants' brother Aden Bellew, who was then a prisoner in the Harrison County jail, and his actions in aiding and abetting Morris' escape from the county jail. But we think there is no merit in this contention. Evidence which

is material, relevant, and otherwise competent to prove the guilt of the accused in a case of this kind cannot be excluded because it may result in the disclosure of facts relating to the commission of other crimes. And this is especially true when the fact of the commission of such other crime forms a part of a chain of facts so intimately connected that the whole must be heard in order to interpret its several parts. Raines v. State, 81 Miss. 489, 33 So. 19; Collier v. State, 106 Miss. 613, 64 So. 373; Hurd v. State, 137 Miss. 178, 102 So. 293; Stone v. State, 210 Miss. 218, 49 So. 2d 263; Tanner v. State, 216 Miss. 150, 61 So. 2d 781.

It was necessary in this case that the State prove that Dale Morris was in lawful custody at the time of his escape, that he escaped from such lawful custody, and that the appellants had knowingly concealed or harbored him after his escape; and evidence to establish all of those facts was competent. The fact that three of the State's witnesses had been indicted jointly with the appellants and had pleaded guilty to the charge, and the facts relating to their joint participation with the appellants in the concealment and harboring of Dale Morris after his escape, were facts relevant to the issue which the jury had to decide; and testimony to establish those facts was properly admitted, even though that testimony showed that Dale Morris was held as a prisoner on a charge of murder and that some one or more of the appellants' co-indictees had aided in his escape, and even though that testimony showed that the appellants' brother, Aden Bellew, who was confined in jail with Morris awaiting trial on another charge, had aided in the escape.

The appellants' attorneys also argue that the court erred in overruling the appellants' motion for a mistrial on account of the statement made by the county attorney

in his argument to the jury which appears on page 415 of the record. The statement made by the county attorney to which objection was made, and the ruling of the trial judge in response to the objection, are as follows;

"By MR. HEWES: When you deliberate on the case I want you to do what your moral senses tell you is right, and I believe that when you do that you will find these two defendants guilty as charged, and you will show to the people of Harrison County that a person who has killed another is not going to be allowed to be harbored and concealed by a citizen of this county and given a gun where he can go out there and kill some more.

BY MR. SEKUL: I object to that form of argument, and move for a mistrial, May it please the Court. There is nothing concerning a killing in this case, and it is highly prejudicial.

BY MR. HEWES: Dale Morris killed a man, and they gave him a gun. That's the testimony.

BY MR. SEKUL: Put that in the record, Mrs. Tootle, and I further move for a mistrial on that ground.

BY THE COURT: Of course at the time of the alleged incident Dale Morris only stood charged with murder. So I think it would have been better had the County Attorney said they had concealed a man who was charged with murder, rather than a man who killed some one. I will sustain the objection to that extent. I will overrule the motion for a mistrial."

We think that the action of the Court in sustaining the objection to the county attorney's argument to the extent mentioned above was proper; and there was no error in the court's refusal to sustain the motion for a mistrial on account of the remarks made by the county attorney.

It is next argued that the court erred in refusing to grant three instructions requested by the defendants, which appear on pages 23, 24, and 25 of the record. But there was no error in the court's refusal to grant those instructions. The first instruction was designed to advise the jury as to the weight to be given to the testimony of a defendant who testifies as a witness in his behalf, and is an almost exact copy of the instruction which this Court refused to approve in Conn v. State, 205 Miss. 165, 38 So. 2d 697. The second instruction purports to define reasonable doubt, but the language used is so ambiguous and uncertain in its meaning that the jury would have been confused, rather than aided, by the giving of the instruction. The subject matter of the third instruction was amply covered by another instruction given by the court which appears on page 17 of the record.

Finally it is argued that the trial court erred in overruling the appellants' motion for a new trial on the ground that the verdict of the jury was contrary to the weight of the evidence. On that question there is a difference of opinion among the members of the Court. All of the judges agree that the evidence was sufficient to sustain the verdict of the jury as to the appellant, Preston Bellew, and that there was no error in the action of the trial court in overruling the motion for a new trial as to him. A majority of the judges, namely, Judges Hall, Lee, Holmes, Ethridge and Gillespie, are of the opinion that the evidence was sufficient to sustain the verdict as to the appellant, Tommy Bellew, and that there was no error in the court's action in overruling the motion for a new trial as to him. But four of the judges, namely, Chief Justice McGehee and Judges Roberds, Kyle and Arrington are of the opinion that the verdict as to Tommy

Bellew is contrary to the weight of the evidence and that the court should have sustained the motion for a new trial as to him. The four dissenting judges do not think that this is a case for a directed verdict of not guilty as to Tommy. But the four dissenting judges are of the opinion that the evidence relating to Tommy's participation in the concealment and harboring of Dale Morris is so slight that it cannot be said that his guilt was proved beyond a reasonable doubt. The four dissenting judges are of the opinion that the jurors, having under consideration at the same time the overwhelming proof of Preston's guilt, failed to evaluate properly the evidence upon which the State relied to convict Tommy, and that another jury should be permitted to pass upon the question of Tommy's guilt separate and apart from the guilt of Preston.

A majority of the judges, however, are of the opinion that the evidence in the record is sufficient to support the verdict of the jury as to Tommy, as well as Preston, and the judgment of the lower court is therefore affirmed as to both appellants.

AFFIRMED.

APPENDIX B

ORDER OF AFFIRMANCE

Monday, November 3, 1958, Court Sitting:::::

Preston Bellew and Tommy Bellew
40,863 vs.
State.

This cause this day came on to be heard on the record herein from the Circuit Court of Harrison County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 19th day of December-1957- a conviction of both Preston Bellew and Tommy Bellew on charges of unlawfully concealing and harboring an escaped prisoner and a sentence of each to serve a term of three years in the State Penitentiary-be and the same is hereby affirmed. It is further ordered and adjudged that the State of Mississippi do have and recover of and from the appellants and Matt Moran, R. E. Raymond, Mrs. R. E. Raymond, Elfine West, Sam Crutanovch, Lorenzo Kuhn, Mrs. Lillian Kuhn, Lucas Beaorvich and Leona Beaorvich, sureties on the appeal bond herein, all of the costs of this appeal to be taxed, etc.,

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APPENDIX C

ORDER OVERRULING SUGGESTION OF ERROR

Monday, December 15th, 1958, Court Sitting:::::::

Preston Bellew and Tommy Bellew
40,863 vs.
State.

This cause this day came on to be heard on the suggestion of error filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be overruled doth order and adjudge that said suggestion of error be and the same is hereby overruled.

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FILE COPY

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MAY 6 1959
JAMES R. BROWNING, Clerk

No. 806

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

TOMMY AND PRESTON BELLEW ..... *Appellants*

versus

STATE OF MISSISSIPPI ..... *Appellee*

(Appeal from the Supreme Court of the State of Mississippi)

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI.

MRS. CLARE SEKUL HORNSBY,
JOHN M. SEKUL,
and
ALBERT SIDNEY JOHNSTON, JR.
Attorneys for Petitioners.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 806

TOMMY AND PRESTON BELLEW ..... *Petitioners*

versus

STATE OF MISSISSIPPI ..... *Respondent*

(Appeal from the Supreme Court of the State of Mississippi)

PETITION FOR WRIT OF CERTIORARI.

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Mississippi, entered in the above-entitled appeal case on November 3, 1958, in which Suggestions of Error were overruled by the Supreme Court of Mississippi on December 15, 1958, causing said judgment of said state court to be and become a final judgment.

OPINIONS BELOW

The opinion of the Supreme Court of Mississippi, dated November 3, 1958, is not yet reported in the official state reports, but is reported in 106 So. 2d 246. Copy of said opinion is attached to the jurisdictional statement in this appeal case, as Appendix "A". No written opinion was rendered by the Supreme Court of Mississippi in overruling petitioners' suggestion of error and additions (amendments) to said suggestion of error.

JURISDICTION

The judgment of the Supreme Court of Mississippi was pronounced on November 3, 1958, and entered of record in Minute Book "BL", page 542, on November 3, 1958. Suggestion of error and additional (amendments) to suggestion of error were overruled on December 15, 1958, and entered in Minute Book "BL", page 561. Said judgments appear as appendages to the jurisdictional statement. Notice of appeal to the Supreme Court of United States was filed in the Supreme Court of Mississippi on December 16, 1958, and service made on the Attorney General of Mississippi on that date. This appeal case was docketed and jurisdictional statement filed in this Court on March 30, 1959, pursuant to authority of Order signed by Mr. Justice Hugo L. Black on March 13, 1959, extending the time to and including April 1, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. A. § 1257(3). This petition for writ of certiorari is filed and docketed in the above-entitled appeal cause of Tommy and Preston Bellew, Appellants, v. State of Mississippi, Appellee.

QUESTIONS PRESENTED

1. Whether the proceedings against petitioners in the trial court of Harrison County, Mississippi, eventuating in verdict and judgment convicting them of the crimes of harboring and concealing an escaped prisoner, so far depart from the accepted course of judicial procedure as to call for review by the Supreme Court of the United States, on the ground that appellants were denied procedural due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and resulted in an unfair trial of petitioners.

2. Whether the state statutes involved in this proceeding, Sections 677 and 2142.5, Mississippi Code of 1942, as construed and applied against appellants by the state courts, including the Supreme Court of the State of Mississippi, were enlarged by intendment, and as so enlarged and expanded, deprive appellants of due process of law and the equal protection of the law, guaranteed against abridgment by the Fourteenth Amendment to the Constitution of the United States.

3. Whether the affirmance of petitioners' conviction of the crimes of harboring and concealing Dale Morris, an escaped prisoner, then awaiting trial for murder, resulted in an expansion of the state statutes, by including acts and conduct not encompassed within said statutes, and as thus construed and applied said state statutes, Sections 677 and 2142.5, Mississippi Code of 1942, Recompiled, violate the Constitution of the United States, providing for due process of law and the equal protection of the law, and requiring persons charged with crime to be advised and apprised of the charge(s) against them, and not be convicted of crimes and offenses not included within, but rather beyond the purpose and intent of the legislative enactments.

4. Whether the words "harbor" and "conceal" contained in and a part of Section 2142.5, Mississippi Code of 1942, Recompiled, have any reasonable relation to the actions and conduct attempted to be proved, and proved, against appellants, and whether the said statute, as construed and applied against petitioners, deprive them of due process of law and the equal protection of the law, guaranteed to them by the Fourteenth Amendment of the Constitution of the United States, because the proof, such as it is against petitioners, fails to show that they treated one Dale Morris, the said escaped prisoner as a guest

in their homes, or elsewhere, and that petitioners did anything concerning the said Dale Morris that could, and did, in fact, remotely approach the meaning and intendment of the words "harbor" and "conceal" as defined by all the lexicographers and by the case law of the United States, both state and Federal; and more particularly, because the whole cases of the State of Mississippi against petitioners is to the effect only that they obtained, or caused to be obtained, food and bedding for said escaped prisoner, and that one of the petitioners, viz: Preston Bellew, indicated where he, the said escaped prisoner, might hide and remain in the "woods" some considerable distance from the home of the said Preston Bellew.

5. Whether the words "or by imprisonment in the penitentiary not to exceed five (5) years," following the words "upon conviction shall be fined not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00)," in Section 2142.5, Mississippi Code of 1942, Recompiled, constitute and result in a causus omissus which may not be supplied by the courts, since a convicted criminal may not be "fined * * * by imprisonment * * *," but may only be punished by imprisonment—the omission of the words "be punished" from said statute destroying the attempted grant of authority to imprison any person "who shall knowingly conceal or harbor" any such prisoner, etc., and whether the Legislature of Mississippi conferred any power and authority on the Courts or juries to fix such punishment in the penitentiary.

6. Whether the omission of the words "be punished" from Section 2142.5, Mississippi Code of 1942, Recompiled, between the words "or" and "by imprisonment," removes violations of said Section 2142.5 from the mean-

ing and intendment of Section 677, Mississippi Code of 1942, Recompiled, defining a "felony" under the Law of Mississippi, as "any violation of law *punished* with death or confinement in the penitentiary," and causes said statutes, Sections 677 and 2142.5, Code of 1942, Recompiled, as construed and applied against petitioners by the Supreme Court of Mississippi, to be and become unconstitutional, and null and void, and violate the Fourteenth Amendment to the Constitution of the United States, and deprive petitioners of due process of law and the equal protection of the law.

7. Whether the sentence of petitioners by the trial judge, affirmed by the Supreme Court of Mississippi, to "three years at hard labor in the (state) penitentiary," is void or voidable, and if the latter may said sentence be corrected and a proper sentence be imposed by fine of not less than $100.00 or more than $500.00.

CONSTITUTIONAL PROVISIONS INVOLVED

The due process clause and the equal protection of the law clause of the Fourteenth Amendment of the Constitution of the United States.

STATEMENT OF THE CASE

I. Procedural History of the Case.

Petitioners were charged with violation of Section 2142.5 of the Mississippi Code of 1942, Recompiled, providing that: "Every person who shall knowingly conceal or harbor any prisoner or convict who has escaped from the lawful custody of any officer, jail, prison, or the penitentiary, within this state shall be guilty of a felony and upon conviction shall be fined not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00) *or by imprisonment* in the penitentiary not to exceed five (5) years." Section 677 of the Mississippi

Code of 1942, Recompiled, provides that: "The term 'felony' when used in any statute, shall mean any violation of law punished with death or confinement in the penitentiary." A trial was had in the circuit court of Harrison County, State of Mississippi, lasting four days, on an indictment which charged that "Peggy Goudelock, Preston Bellew, Tommy Bellew, Douglas Thomas and Ruth Johnson, did unlawfully, wilfully, feloniously and knowingly conceal and harbor one Dale Morris, an escaped prisoner, charged with the crime of murder, who had been confined as a prisoner awaiting trial for murder under the order of the Circuit Court of Hancock County, Mississippi," quoting from said indictment and the opinion of the Supreme Court of Mississippi. (See R. 2-3, and Exhibit "A" to Jurisdictional Statement of appellants filed in their appeal-case on March 30, 1959 from the final judgment of the Supreme Court of Mississippi.) After jury verdict of "guilty as charged" petitioners were sentenced to a term of three years at hard labor each in the state penitentiary, and costs were assessed against them. Their motions for new trial filed in the trial court were overruled without opportunity for hearing and argument.

The Supreme Court of Mississippi affirmed the judgment of conviction and sentence on November 3, 1958, and overruled petitioners' suggestion of error and amended (addition) to suggestion of error on December 15, 1958. Petitioners have no further remedy for appellate review in the state courts of Mississippi, and no remedy for the correction of the judgment and sentence pronounced against them.

II. The Facts Material to the Questions Presented.

The petitioners' brother, Aden Bellew, was incarcerated in the Harrison County jail at the time one Dale

Morris, a prisoner awaiting trial on a charge of murder, escaped and made his way into a wooded section in the country in north Harrison County, on the night of June 6, 1958. The details of the escape of Dale Morris and his subsequent recapture, are not material here, except insofar as they bear on the question of admissibility of evidence against petitioners. The same is true as to the charge against and confinement of petitioners' brother. However, because the contention is made that petitioners were denied procedural due process of law in their trial and conviction, it is necessary to refer to the evidence on behalf of the state, and show that the prosecution was permitted, over objection, to detail and parade before the court and jury evidentiary facts concerning the crimes charged against Dale Morris, Aden Bellew, and co-indictees of petitioners, and the prosecution to argue that "Dale Morris killed a man and they gave him a gun." That's the testimony. (R. 415)

The evidence on behalf of the respondent was to the effect that on the night of the escape of said Dale Morris from the county jail in Gulfport, Mississippi, petitioner Preston Bellew, with one Douglas Thomas, met the escapee in a wooded section in the northern portion, or part of Harrison County and indicated to him where he might hide in the woods some three quarters of a mile from the home of said Preston Bellew, and that Preston Bellew furnished him groceries "and things." Further, that besides furnishing food and water Preston Bellew had many talks with said escapee concerning things of common interest and his, the escapee's, plight. Petitioner Tommy Bellew did nothing until the last week or ten (10) days of the escapee's stay at his, the escapee's hiding place in said wooded area. Tommy Bellew allegedly had three or four conversations with the escapee, Dale Morris,

and with petitioner Preston Bellew and others, during which the state's witnesses testified Tommy Bellew suggested plans and means to enable the escapee to make a getaway from his camp-site. These conversations were said to have taken place elsewhere and away from the site, with the exception of one occasion when a co-defendant, Peggy Goudelock, said she saw both petitioners talk with the escapee Morris near the site but she said she was some distance away. Another co-defendant, Ruth Johnson, the person who planned, with others, and executed the escape of Dale Morris, was said to have requested Petitioner Tommy Bellew to help her move some of the escapee's clothes from the house to an old automobile a short distance behind it. The house in which the Johnson woman was living at the time was more than a mile from the location of the escapee's hiding place in the woods. Petitioner Preston Bellew, it was testified by state's witnesses, led the escapee in an automobile to a highway to the west in order that he, the escapee, could travel to evade capture..

Petitioners strongly and steadfastly denied their guilt, and any participation in any way in the concealing or harboring of the escapee, Dale Morris, or of doing any acts which could, or would, involve them, and they produced evidence and witnesses to establish an alibi, accounting for their time and whereabouts for every day and practically every minute of every day of the period the said escapee remained in the wooded area some three quarters of a mile, or so, from the home of petitioner Preston Bellew, and petitioners supported their position and contentions with testimony of good character and reputation.

No proof was made by the state that petitioners treated the escapee, Dale Morris, as a guest in their home, or elsewhere; and no evidence was introduced to show, and

prove, that petitioners protected the said Dale Morris, or that they furnished him shelter, lodging, and entertainment, or that petitioners gave the said Dale Morris refuge, cared for and protected him. No proof was made, or offered to be made, that petitioners performed any physical acts tending to the secretion of the body of the escapee Dale Morris. Nevertheless petitioners were convicted of the crime(s) of "harboring" and "concealing" the said Dale Morris, and their conviction and sentence were affirmed by the Supreme Court of Mississippi.

III. The Federal Questions Raised Below in the Trial Court and Before the Supreme Court of the State of Mississippi.

(A) In the Trial Court: (Motion for New Trial)

For further ground in support of their motion for new trial, petitioners contended that Section 2142.5 of the Mississippi Code of 1942, Recompiled, was unconstitutional in that said law in substance contained two crimes, one of concealing and the other of harboring, and does not describe the acts or things necessary to sustain such charges, and in (no) way affords petitioners information necessary to prepare their defense, and deprived them of due process of law as provided by the Constitution of the State of Mississippi and by the Constitution of the United States, and contended their conviction thereunder was invalid, void and of no legal effect.

(B) In the Supreme Court of Mississippi. (Original Brief, Suggestion of Error, and Addition (Amendments) to Suggestion of error)

In support of their suggestion of error in the opinion of the Supreme Court of Mississippi petitioners urged and showed that the statute, Section 2142.5, Mississippi Code of 1942, Recompiled, as construed and applied against

them, is unconstitutional, null and void, and violates the Fourteenth Amendment to the Constitution of the United States, and said they were denied due process of law and the equal protection of the law. They contended and showed that the indictment returned against them, and their co-defendants named in said indictment, did not charge a crime; that the statute under which such indictment was brought, Section 2142.5, Code of 1942, Recompiled, was extended by intendment according to the opinion of the Court and by the verdict of the jury and the judgment of the trial court, and as so extended is unconstitutional, and violates the Fourteenth Amendment to the Constitution of the United States. Petitioners contended that Section 2142.5, Code of 1952, Recompiled, as construed and applied against them, violated the Fourteenth Amendment to the Constitution of the United States, in that it denied petitioners due process of law and the equal protection of the law. Petitioners showed that the actions and conduct testified to against them by state witnesses, did not remotely prove harboring and concealing of Dale Morris, the escaped prisoner, by petitioners as the words "harbor" and "conceal" are defined by the lexicographers and decided cases, both state and Federal, and urged that since Section 2142.5, Code of 1942, Recompiled, imposes punishment as for a misdemeanor and for a felony, it must be considered to be a misdemeanor only, because the statute fails to give either the court or the jury any discretion in the matter of fixing such punishment.

ARGUMENT

I. Procedural Due Process of Law—Right to Fair and Impartial Trial.

(a) The admission of evidence for or against the accused must be according to the established procedure or

rules of practice in each state in similar cases, and the punishment inflicted must be authorized by law.

The trial court admitted evidence, over the objection of petitioners, of the commission of other and different crimes and offenses by co-defendants, co-indictees, of petitioners, the furnishing of guns to Dale Morris, the escaped prisoner, of conversations by and between persons other than petitioners, out of the presence and hearing of petitioners, and at times when petitioners could not possibly have been present: and likewise admitted in evidence over the objection of petitioners testimony regarding their brother, Aden Bellew, then a prisoner in the Harrison County jail, and concerning the aiding and abetting the jail escape of Dale Morris, and having reference to the escape of Morris. Such evidence did not bear on the guilt or innocence of petitioners, and did not form part of a chain of facts so intimately connected that the whole must be heard in order to interpret its several parts, as held by the state court. Petitioners were not charged with conspiracy to violate Section 2142.5, Code of 1942, Recompiled. The admission of such evidence against petitioners was contrary to established procedure and rules of practice in Mississippi. Beginning with the early case of Dyson v. State, 25 Miss. 362, the state court has consistently held that the necessity for enforcing the rule that no evidence can be admissible which does not tend to prove or disprove the issue joined is much stronger in criminal than in civil cases. In Harper v. State, 83 Miss. 402, 35 So. 572, the state court held that in a prosecution for murder no testimony should be admitted which does not shed some light upon the acts of defendant, or in some way tend to support the hypothesis upon which the state seeks to justify his conviction, and which does not constitute admissions showing

a guilty knowledge, confessions of guilt, or declarations against interest.

The other offenses testified about by state witnesses were not, and do not pretend to be, part of the same transaction charged in the indictment against petitioners.

Although this Court held, in Lisenba v. People of State of California, 314 U. S. 219, 62 S. Ct. 280, 286, that the Fourteenth Amendment leaves California free to adopt a rule of relevance which the Supreme Court of that state held was applied in accordance with the state's law, we note the limitation of the rule as announced in the Court's opinion, and believe the Court will now rule that such principle is applicable only to cases where the disconnected acts are shown to establish intent, design, and system, on the part of the defendants themselves; and not as concerns others, about which defendants have no causal connection.

The decision of the state court against petitioners denies them procedural due process, according to the established procedure and rules of practice in Mississippi, as announced in Whitlock v. State of Mississippi, 6 So. 237; Brown v. State, 72 Miss. 997, 17 So. 278; Benoit v. City of Bay St. Louis, 103 Miss. 218, 60 So. 137; Collier v. State, 106 Miss. 613, 64 So. 373; Baygent v. State, 144 Miss. 442, 110 So. 114; McLin v. State, 150 Miss. 159, 116 So. 533; Willoughby v. State, 154 Miss. 653, 122 So. 757, 63 ALR 1319; Floyd v. State, 166 Miss. 15, 148 So. 226; Gunter v. State, 180 Miss. 769, 178 So. 472; Kehoe v. State, 194 Miss. 339, 12 So. 2d 149; Crafton v. State, 200 Miss. 10, 26 So. 2d 347; Augustine v. State, 201 Miss. 277, 28 So. 2d 243; Walker v. State, 201 Miss. 780, 30 So. 2d 229; Scarbrough v. State, 204 Miss. 387, 37 So. 2d 748; Patton v. State, 209 Miss. 138, 46 So. 2d 90; Dossett v. State, 211 Miss. 650, 52 So. 2d 490; Bennett v. State,

Miss., 52 So. 2d 837; Tanner v. State, 216 Miss. 150, 61 So. 2d 781; Pegram v. State, Miss., 78 So. 2d 153; Hawkins v. State, Miss., 80 So. 2d 1, and Brown v. State, Miss., 80 So. 2d 761, holding that evidence in a criminal case must be confined to the point in issue, and proof of crimes distinct from that alleged in indictment should not be admitted in evidence against accused, excepting only when such evidence of other crimes tends directly to establish the particular crime.

For the asserted error it is respectfully submitted that petitioners did not have a fair and impartial trial.

Petitioners will show under Point III of their argument that the punishment inflicted on them by the state courts was not authorized by law.

II. CERTIORARI SHOULD BE GRANTED IN THE INSTANT CASE BECAUSE IMPORTANT QUESTIONS AFFECTING LAW ENFORCEMENT AND THE RIGHTS OF PETITIONERS (ACCUSED) UNDER THE FOURTEENTH AMENDMENT ARE INVOLVED: The doctrine of the Winters v. New York, Chaplinsky, Resnick and Weitzel Cases needs amplification in its application to the extension and expansion of state statutes by intendment.

Section 2142.5, Mississippi Code of 1942, Recompiled, provides:

"Every person who shall knowingly conceal or harbor any prisoner or convict who has escaped from the lawful custody of any officer, jail, prison, or the penitentiary, within this state shall be guilty of a felony and upon conviction shall be fined not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00) *or by imprisonment* in the peni-

tentiary not to exceed five (5) years." (Emphasis supplied)

Since the indictment returned against appellants, R. 2, charges that "* * * * Preston Bellew, Tommy Bellew (and others), * * * did * * * conceal and harbor one DALE MORRIS, * * *." it is necessary to a full understanding and appreciation of the Legislative intent, to examine into the meaning—the definition— of the words "conceal" and "harbor" as used in the state statute. Section 2142.5, Code of 1942, Recompiled.

In the early case of Fitzgerald v. Brophy, 1 Pa. Co. Ct. R. 142, the court held that "harboring" means protecting, and said that a defendant does not harbor a stray dog, so as to be liable for injuries inflicted by it, by merely permitting such dog to live under a building in his coalyard. The defendant there did more than petitioners here—he permitted the dog to live under a building in his, the defendant's coal-yard. In this appeal-case Dale Morris, the escaped prisoner lived out "in the woods," a great distance from the home of Preston Bellew. Within the intendment of the statute, as decided by the Court in the Fitzgerald v. Brophy Case, supra, there could be no "harboring" of Morris in the woods. In State v. Pringle, 147 Wash. 555, 266 P. 196, 197, the court held that furnishing a shelter, lodging, and entertainment to an escaped prisoner with knowledge of all the facts thereof, though constituting "harboring," was not sufficient to constitute concealment of the prisoner or harboring for the purpose of concealment, under Rem. Como. Stat. § 2346. It follows there was no concealment of Morris according to the evidence in the case against petitioners. And, too, there may be no harboring for purpose of concealment in the case against petitioners. In State v. Modlin, 197 Mo. 376, 95 SW 345, 346,

the court said that "harboring theives" means to give them shelter or lodging, or entertain them as guests. Under the facts of the case against petitioners, there was no "harboring" of Morris, the escapee, since he was not given shelter or lodging, and he was not entertained as a guest. In Dennis v. State, 230 Ind. 210, 102 NE2d 650, 653, the court said that the word "harbor" as used in the statute defining accessory after the fact meant to shelter, to give refuge, to lodge, care for and protect any person guilty of a felony. The proof, such as it is is against petitioners, does not show that Dale Morris, the escaped prisoner, was given shelter, refuge, cared for and protected. Morris was "out in the woods" some 3/4 of a mile—a great distance from the home of petitioner Preston Bellew. In Firpo v. United States, C. C. A. N. Y., 251 F. 850, 853, the court held that to "harbor" as used in Criminal Code § 42, 18 U. S. C. A. § 94, providing for punishment of any one who shall harbor, conceal, protect, or assist any soldier who has deserted from service, meant to lodge, to care for, after secreting the deserter. The evidence, such as it is against petitioners Tommy and Preston Bellew, does not even pretend to show that petitioners lodged Morris, the escapee, and that they cared for him, after it is said he was secreted; and secreted where, in the "open" woods? In Herrera v. United States, C. A. Cal., 208 F. 2d 215, 218, the Court held that "harbor" means to afford lodging to; to entertain as a guest; to shelter, to receive; to give refuge to; to contain; to indulge or cherish (a thought of feeling); now usually with reference to evil, especially unlawful, act or intent. The evidence against petitioners, such as it is, does not remotely prove, or even suggest, that petitioners, or either of them, sheltered, received, gave refuge to, contained, indulged or cherished, Morris, the escaped prisoner. In United States v. Shapiro, C. C. A. N. Y., 113 F. 2d

891, 893, construing the statute penalizing any person who may "harbor" or "conceal" any person for whose arrest a federal warrant had been issued, the court held that the words "harbor" and "conceal" refer to some physical act tending to the secretion of the body of the offender, and mean to hide, secrete, or keep out of sight or to lodge or care for, after secreting the deserter, and said that the payment of money to a fugitive so that he may shelter, feed, or hide himself, is not within the accepted meanings of the words "harbor" and "conceal," as contained in Criminal Code, § 141, 18 U. S. C. A. § 246. The evidence, such as it is against petitioners, falls far short of proving the acts held by the Court, in United States v. Shapiro, supra, to be necessary to constitute the crime denounced by the statute, and the proof, such as it is against petitioners, falls far short of proving the crime or crimes intended by the Legislature of Mississippi, since the words "harbor" and "conceal" must be construed in their ordinary common use and meaning. In Tygard v. Falor, 163 Mo. 234, 63 SW 672, 674, the court held that "conceal" merely means not letting come to observation, and said that the word does not charge a criminal act. In Susnjar v. United States, C. C. A. Ohio, 27 F. 2d 223, 224, the court held that under Immigration Act, § 8 (8 U. S. C. A. § 144), prohibiting concealing or harboring, or attempt to conceal or harbor, or assist or abet others to conceal or harbor, any alien, etc., word "harbor" means to clandestinely shelter, succor, and protect improperly admitted aliens, and the word "conceal" meant to shield from observation and to prevent discovery of such alien persons. In the case against petitioners, the evidence, such as it is, falls far short of coming within the meaning of the words "harbor" and "conceal" as disclosed by all the decided cases.

Section 2142.5, Mississippi Code of 1942, Recompiled, was extended and expanded by intendment, and as thus construed and applied against petitioners by the state court, it is unconstitutional, and violates the Fourteenth Amendment to the Constitution of the United States.

As said by the Court in United States v. Williams, 341 U. S. 70, 71 S. Ct. 581, criminal statutes should be given the meaning their language most obviously invites, and their scope should not be extended to conduct not clearly within their terms. See also 14 Am Jur 776. In United States v. Weitzel, 246 U. S. 533, 38 S. Ct. 381, the Court held that statutes creating and defining crimes are not to be extended by intendment because the court thinks the Legislature should have made them more comprehensive, citing Todd v. United States, 158 U. S. 278, 15 S. Ct. 889, and United States v. Harris, 177 U. S. 305, 20 S. Ct. 609, 610.

It is now well settled that due process of law may be denied persons charged with crime by extending and expanding criminal statutes beyond their scope and context, since for an act to constitute a crime it must come within both the letter and spirit of the act. These principles are so universally accepted as to require no further citation of authority.

Section 2142.5, Code of 1942, Recompiled, as construed and applied by the state court against petitioners, denies them the equal protection of the law of the State of Mississippi, and violates the Equal Protection of the Law clause of the Fourteenth Amendment to the Constitution of the United States.

Beginning in the year 1908, with Hatton v. State, 92 Miss. 651, 46 So. 708, the state court has consistently held its function was to construe penal statutes as they

are enacted, and not to enlarge their scope to meet the gravity of each particular offense. Continuously since Stewart v. State, 95 Miss. 627, 49 So. 615, the state court has held that criminal and penal statutes are strictly construed, in favor of the accused and against the state. And without interruption since the state court's decision in State v. Traylor, 100 Miss. 544, 56 So. 521, sugn. of error denied (1912) 57 So. 1, the Supreme Court of Mississippi has held that while criminal statutes may be contracted or expanded by interpretation, so as to exempt from punishment those not within their spirit and purpose, such statutes cannot be expanded so as to impose punishment upon one not within their strict letter. The state rule has continued unabated through the decisions in Daisey Ratcliff v. State of Mississippi, decided December 15, 1958, not yet reported in the official state reports, but appearing in 107 So. 2d 728, and Mary Rose v. State of Mississippi, decided December 15, 1958, not yet reported in the official state reports, but appearing in 107 So. 2d 730. In the Ratcliff Case the state court said: (p. 730, 107 So. 2d)

> "• • • This is a plain requirement of the statute. It may be that the legislature intended to say 'incestuous or miscegenetic and void.' But this Court cannot amend the act so as to make persons subject to punishment thereunder who are not otherwise punishable by the express terms thereof.
>
> "It is settled law that penal statutes must be strictly construed. We must enforce the statute as written, not as we think the legislature might have intended to write it; for the question is not what the legislature intended to enact, *but* what is the meaning of that which it did enact. For an act to constitute a crime, it must come within both the letter and spirit of the act. • • •

> These principles are so universally accepted that no citation of authority is necessary. * * *. Reversed and appellant discharged." (Emphasis supplied)

The state court would enforce one rule for others and a different rule for petitioners. This is a violation of the equal protection clause of the Federal Constitution.

III. THE JUDGMENT SENTENCING PETITIONERS TO "THREE YEARS AT HARD LABOR IN THE STATE PENITETIARY" IS VOID, BECAUSE:

(a) Section 2142.5, Mississippi Code of 1942, Recompiled, as construed and applied against petitioners, is unconstitutional and violates the Fourteenth Amendment to the United States Constitution.

The state statute, as construed and applied against petitioners, denies them due process of law and the equal protection of the law, guaranteed against abridgment by state action.

(b) Section 677, Mississippi Code of 1942, Recompiled, providing that a "felony" is any violation of law *punished* with death or confinement in the penitentiary, means an imprisonment expressly authorized by law, either by directly providing for imprisonment in such penitentiary as a punishment for the commissoion of a particular offense, or by denominating the offense a felony and providing generally for such imprisonment of those convicted of felonies for which a specific punishment is not otherwise prescribed;

(c) The word "punished", like the word "punishable," as used in the phrase "punished with death or confinement in the penitentiary," in Section 677, Code of 1942, Recompiled, means liable to punishment or capable

of being punished by imprisonment in the state penitentiary.

(d) Section 2142.5, Mississippi Code of 1942, Recompiled, providing: "Every person who shall knowingly conceal or harbor any prisoner or convict who has escaped from the lawful custody of any officer, jail, prison, or the penitentiary, within this state shall be guilty of a felony and upon conviction shall be *fined* not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00) *or by imprisonment* in the penitentiary not to exceed five (5) years," (Emphasis supplied) does not directly authorize imprisonment in the state penitentiary, and no statute of the state of Mississippi provides generally for imprisonment in such penitentiary of persons convicted of felonies for which a specific punishment is not otherwise prescribed.

(e) A person guilty of a felony may not be fined * * * by imprisonment in the penitentiary * * *. The omission of the words "or be punished" or "be punishable" in Section 2142.5, Code of 1942, renders the sentence provision (requirement) of Section 2142.5, Code of 1942, ambiguous and void, and deprives petitioners of due process of law. The maximum penalty for violation of said Section 2142.5, Code of 1942, is a fine of not less than $100 nor more than $500.

(f) If the words "shall be guilty of a felony" are deleted from the statute, Section 2142.5, Code of 1942, no crime exists. Absent the words "be punished" or "be punishable" between "or" and "by imprisonment in the penitentiary" in Section 2142.5, Code of 1942, Recompiled, there is no express authorization of law for any imprisonment of persons guilty of harboring or concealing an escaped prisoner; and the Mississip-

pi Legislature has not provided generally for imprisonment in the penitentiary, or otherwise, of persons convicted of a felony for which a specific punishment is not otherwise prescribed.

(g) The words "shall be fined * * * *or by imprisonment* in the penitentiary * * *," as used in Section 2142.5, Mississippi Code of 1942, Recompiled, are incapable of construction and interpretation to effect a direct authorization of imprisonment in the state penitentiary.

A sentence pronounced by a court may be improper or illegal for various and sundry reasons. Such sentence may be void for lack of power to impose it. In 15 Am Jur 116, Criminal Law, Section 459, under the heading "Improper and Illegal Sentence," appears the following: (quote)

> "* * * A judgment of conviction under an unconstitutional law or a sentence imposed by a court without jurisdiction to pass such a sentence is not merely irregular or erroneous, but illegal and void. * * *."

In State v. Taylor (State ex rel. Parrish v. Coleman, Sheriff) 9 So. 2d 708, the Supreme Court of Florida said:

> "* * * The word 'punishable' may be defined as 'capable of being punished *by law or right.*' Webster's New International Dictionary. * * *." (Emphasis supplied)

In Ex parte Humphrey, 64 Cal. App. 572, 222 P. 366, 357, the court held that Pen. Code, § 19, providing a felony is a crime punishable with death or with imprisonment in the state prison, the term "punishable by imprisonment in the state prison," implies an imprisonment expressly authorized by law, either by directly providing for imprisonment in such prison as a punishment for the commission of a particular offense, or by denominating

the offense a felony and providing generally for such imprisonment of those convicted of felonies for which a specific punishment is not prescribed.

In re Jackson, 14 Blatchf. 245, 13 Fed. Cas. 194-197, the court held that the word "punishable," as used in a statute declaring that a violation thereof shall be punishable by a fine of not more nor less than a designated amount, indicates that a crime is intended, and not a pecuniary penalty to be recovered by a civil action.

In People v. Superior Court of City and County of San Francisco, 116 Cal. App. 412, 2 P. 2d 843, 844. the court said that the word "punishable" is defined as the deserving of or capable or liable to punishment * * * capable of being punished *by law or right* * * * said of persons or offenses. (Emphasis supplied)

In State v. Hacker, Mo., 214 S. W. 2d 413, 415, the court said that the word "punished' within statute making a subsequent offender punishable by imprisonment in penitentiary for longest term prescribed for first offense, if subsequent offense is such that upon conviction, defendant would be "punished" by imprisonment for limited term of years, was an inadvertent substitution for the word "punishable."

In Oveido v. Baldi, 152 Pa. Super. 340, 31 A. 3d 753, 754, and Commonwealth ex rel. Oveido v. Baldi, 347 Pa. 601, 33 A. 2d 12, 13, the courts said the word "punishable" as used in phrase "punishable by imprisonment in a state penitentiary" means liable to punishment or capable of being punished by imprisonment in a state penitentiary.

Section 2142.5, Mississippi Code of 1942, Recompiled, does not contain the words "punished" or "punishable",

and there is no direction to the court to inflict punishment upon those convicted of violation of such statute.

A peron may not be fined by imprisonment. The words of Section 2142.5, Code of 1942, require the imposition of a fine of not less than $100.00 nor more than $500.00, on persons convicted of violation of the statute, but there is no direction to punish such convicted persons by imprisonment in the penitentiary. The words "shall be fined * * * or by imprisonment in the penitentiary," as used in said Section 2142.5, Code of 1942, are too vague and uncertain and indefinite to permit imposition of sentence of petitioners at hard labor in the state penitentiary. The sentence imposed by the trial judge and affirmed and approved by the state Supreme Court, is illegal; it is void for lack of authority from the Legislature of Mississippi. Absent the words "be punished" or "be punishable" between "or" and "by imprisonment in the penitentiary" in Section 2142.5, Code of 1942, there is no express authorization of law for any imprisonment of persons guilty of harboring or concealing an escaped prisoner; and the Mississippi Legislature has not provided generally for imprisonment in the penitentiary, or otherwise, of persons convicted of a felony for which a specific punishment is not otherwise prescribed.

Since the Legislature of Mississippi only can prescribe punishment for violation of the criminal laws of the state, the trial court and the supreme court of Mississippi were powerless to sentence petitioners to the penitentiary of Mississippi.

In order to satisfy the requirements of constitutional law, and prescribe for definite and positive punishment for criminal acts, the Legislature, and not the courts, must in no uncertain terms provide for the punishment to

be prescribed and inflicted on persons convicted of violating the criminal laws of the state. Section 2142.5, Mississippi Code of 1942, Recompiled, is not only inaptly drawn, but omits direction to punish by imprisonment persons convicted of violating the statute by harboring and concealing escaped prisoners, etc. Insofar as the statute provides and prescribes punishment by fine of not less than one hunderd dollars ($100.00) nor more than five hundred dollars ($500.00), it is sufficient. But as a direction to impose punishment by imprisonment in the penitentiary, or otherwise, the statute fails to accomplish the purpose of directing such imprisonment.

In Joseph Mossew v. United States, C. C. A. 2d, 266 Fed. 18, 11 A. L. R. 1261, the court held that no conviction can be had for violation of a statute for which no penalty is provided. In the opinion, by Manton, Circuit Judge, as appears on pages 1263, 1264, and 1265, 11 A. L. R., it is said: (quote)

> "Section 4 declares it unlawful to make any unjust or unreasonable rate or charge in handling or dealing in necessaries, but there is no provision for punishment of this particular act thus made unlawful. As to other offenses which are denounced by the act, for the doing of which acts the section makes it unlawful, a penalty is prescribed; but nowhere in the act is a penalty prescribed for doing any of the acts made unlawful by this section, and there is no general provision in the act announcing a penalty or prescribing punishment for a violation of these provisions, where no specific penalty or punishment is provided. It further appears that this alleged indictment charges certain acts as unlawful, that is to say, making an unreasonable and unjust charge for sugar; but no penatly or punishment for a violation of the statute is prescribed by a valid statute.

"We are of the opinion that no crime is charged in this indictment. Therefore the conviction, even though upon plaintiff in error's plea of guilty, is void. Payment of the fine cannot be deemed to be a voluntary contribution to the government, and has been held not to be a bar in a suit to recover. United States v. Rothstein, 109 C. C. A. 521, 187 Fed. 269; Durr v. Howard, 6 Ark. 461; Devlin v. United States, 12 Ct. Cl. 266. * * *."

In Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648, it was said: Congress "must first make an act a crime, *affix a punishment to it*, and prescribe what courts have jurisdiction of such an indictment, before any Federal tribunal can determine the guilt or innocence of the supposed offender," citing United States v. Hudson, 7 Cranch, 32, 3 L. ed. 259.

Paraphrasing Mossew v. United States, p. 1265, 11 A. L. R., by failing to provide a penalty for an infraction of Section 2142.5, Mississippi Code of 1942, Recompiled, as a felony, or to prescribe a punishment as for a felony, as to which see Sec. 677, Mississippi Code of 1942, Recompiled, where a "felony" is said to mean any violation of law *punished* with death or confinement in the penitentiary, the principal statute here involved, Section 2142.5, Code of 1942, Recompiled, does not denounce the unlawful act(s) although criminal, and punishable as a misdemeanor, as a felony, and it, they, cannot be punished as such by imprisonment in the state penitentiary.

Because of the lack of penalty, it was held in State v. Fair Lawn Service Center, 20 NJ 468, 120 A2d 233, that a person cannot be convicted as disorderly person and fined for violation of the Sunday observance law.

The sentence pronounced by the trial court, and affirmed by the Supreme Court of Mississippi, on November 3, 1958, confining petitioners to "three years at hard labor in the (state) penitentiary," is void for lack of power to impose it. Re Nielsen, 131 U. S. 176, 33 L. ed 118, 9 S. Ct. 672; Kachnic v. United States (C. C. A. 9th) 53 F. 2d 312, 79 A. L. R. 1366. In the Kachnic v. United States Case, supra, the court held that a sentence of imprisonment not within the power of the court to impose is void, though imposed to run concurrently with a valid sentence.

CONCLUSION

Wherefore, petitioners respectfully pray that a writ of certiorari issue to the Supreme Court of Mississippi, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment herein of said Supreme Court of the State of Mississippi be reversed by this Court, and for such other and further relief as to this Court may seem proper in the premises.

Respectfully submitted,

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Dated April 23, 1959.